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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1915—JANUARY TERM, 1916.

VOLUME XCIX.

HARRY C. LINDSAY,

OFFICIAL REPORTER.

PREPARED AND EDITED BY

HENRY P. STODDART,

DEPUTY REPORTER.

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SEP 13 1916

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CASES DETERMINED
IN THE
SUPREME COURT OF NEBRASKA
SEPTEMBER TERM, 1915.

SALEM GENHO, APPELLEE, V. GEORGE R. JACKSON,
APPELLANT.

FILED NOVEMBER 13, 1915. No. 18289.

1. **Pleading: DEMURRER: WAIVER.** Where a party demurs to a petition because several causes of action are improperly joined, but answers over after an adverse ruling thereon, and goes to trial on the merits of an issue he has elected to join, he waives the error, if any, in such ruling.
2. ———: ———. When a petition purports to set out several causes of action, it will be held good against a general demurrer, if one, or more, cause of action is well pleaded.

APPEAL from the district court for Phelps county:
HARRY S. DUNGAN, JUDGE. *Affirmed.*

Dravo & Dilworth, for appellant.

H. M. Sinclair and *A. J. Shafer*, contra.

MORRISSEY, C. J.

Action for libel and slander and damages flowing therefrom. November 8, 1911, plaintiff consigned a car-load of cattle to Wood Brothers Commission Company of South Omaha. The cattle had been penned in the railroad stock-yards at Holdrege. Defendant also had cattle in these stock-yards, and claims that four head of his fat cattle were taken out of his pen and four head of smaller cattle substituted. Discovering the exchange of cattle, he left Holdrege to follow plaintiff's shipment to South Omaha,

Genho v. Jackson.

and, when passing through Lincoln, sent the following telegram:

"Lincoln, Neb., Nov. 8, 1911.

"Wood Bros. Commission Co. Hold cattle and proceeds consigned to you by Salem Genho, Bertrand. Way-bill No. 20, Nov. 8, car C., M. & St. P. 1253. Part contents stolen. Am replevying same. Have officer arrest party in charge. Am following car. George R. Jackson."

It is alleged that this telegram was intended to, and did, charge the plaintiff with the crime of larceny. There is also an allegation that because of this telegram the sale of plaintiff's cattle was delayed and they were subsequently sold on a falling market, etc. Items of damage on this cause of action aggregating \$124.69 are set out. There is a further allegation of slander because of words spoken to the sheriff of Phelps county, wherein defendant charged plaintiff with the larceny of his cattle. There is a prayer for judgment in the sum of \$1,124.69. By general demurrer to the petition it was alleged that several causes of action were improperly joined, and that the petition did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and defendant answered, denying certain of the allegations of the petition, pleading specially to others, and finally asking an affirmative judgment against plaintiff for what he alleged to be the difference in the value of his cattle and of those substituted. There was a verdict and judgment in favor of plaintiff for \$275.

It is insisted that several causes of action are improperly joined, and therefore the court erred in overruling the demurrer. A like question was presented in *Worrall Grain Co. v. Johnson*, 83 Neb. 349; but the court held that in answering over after the ruling on the demurrer, alleging that several causes of action were improperly joined, defendant waived his right to complain, citing with approval *Becker v. Simonds*, 33 Neb. 680; *Buck & Greenwood v. Reed*, 27 Neb. 67; *Pottinger v. Garrison*, 3 Neb. 221; *Lederer v. Union Savings Bank*, 52 Neb. 133; and

Kiser v. Denney.

Dorrington v. Minnick, 15 Neb. 397. In *Dinges v. Riggs*, 43 Neb. 710, plaintiff pleaded three causes of action, namely, malicious prosecution, damage to plaintiff's business by arresting occupants of her place, and slander. The court said: "Dinges assigns here that the district court erred in overruling his motion to compel the plaintiff below to elect upon which one of the three causes of action stated in her petition she would rely. There was no error in this ruling of the court. The causes of action, and each of them, stated in the petition sounded in tort, and they all grew out of and were connected with the same transaction, and were therefore properly joined."

As to the contention that the petition did not state a cause of action, it is sufficient to say that as to one of the causes of action there is no complaint. The demurrer went to the sufficiency of the petition as a whole, and, if any cause of action was well pleaded, no error can be predicated on the ruling thereon.

The succeeding assignments of error are aimed at the instructions of the court; but, when the instructions are considered in connection with the pleadings and the proof, no ground of criticism appears.

The cause was fairly tried and the judgment is

AFFIRMED.

SYLVIA KISER, APPELLEE V. CHARLES B. DENNEY,
APPELLANT.

FILED NOVEMBER 13, 1915. No. 18347.

Contracts: TIME FOR PERFORMANCE: QUESTION FOR COURT. In the construction of an executory contract, which does not by its terms fix a time for its performance, when there is no fact in dispute, the question of reasonable time for its performance is one of law to be determined by the court.

Kiser v. Denney.

APPEAL from the district court for Douglas county:
GEORGE A. DAY, JUDGE. *Reversed.*

Weaver & Giller, for appellant.

James B. Kelkenney and John E. Quinn, contra.

MORRISSEY, C. J.

March 8, 1909, plaintiff paid defendant \$100 on a contract for the purchase of certain real estate at the agreed price of \$5,000. The contract, which was in writing, provided: "A complete abstract of title, brought down to date, is to be furnished. Should any defect be found in the title and insisted upon, this agreement shall be null and void, unless otherwise agreed, and all moneys paid over by said Kiser shall be returned to her." A few days later an abstract was furnished plaintiff which disclosed a suit pending, in the district court for the county where the real estate was situated, against the holder of the record title. It is conceded that the suit constituted at least a contingent defect in the title. Plaintiff demanded a return of the money, and March 23, 1909, commenced this action to recover the amount paid. April 1 following, defendant secured the dismissal of the suit in the district court, and made a tender of the deed and abstract. The tender was not accepted. On the trial of this cause the jury was requested to determine whether or not defendant tendered the deed and abstract within a reasonable time. The jury found that he did not, and returned a verdict in favor of plaintiff for the amount paid on the contract.

We are called upon to decide whether there was a question of fact to submit to a jury, or merely a question of law to be determined by the court. There is no dispute in the evidence. But 23 or 24 days elapsed between the making of the contract and the tender of a sufficient deed and an abstract showing a clear title. There is nothing in the language of the contract to indicate that time is of its essence. It provided for the usual formalities in the

transfer of the title to real estate. The contract contemplated the preparation of the deed and abstract, and their submission for examination, but did not fix a time within which this should be done. An abstract was prepared, counsel for plaintiff made objection because of the pending suit, steps were taken to secure its dismissal, it was dismissed, and on April 2 a complete tender was made.

In *Spoor v. Spooner*, 12 Met. (Mass.) 281, in the body of the opinion, it is said: "As to contracts where something is to be performed, and the contract is silent on the subject, what is a reasonable time for its performance is held to be matter of law. And so, where the facts are agreed, reasonable time is matter of law. But where the facts are controverted, and the motives of the parties are involved in the question, there reasonable time is a question for the jury." This is cited with approval in *Williams v. Powell*, 101 Mass. 467, 3 Am. Rep. 396. To the same effect is *Pratt v. Farrar*, 10 Allen (Mass.) 519. The court said: "The facts not being in dispute, what was reasonable time was rightly treated as a question of law." And the same doctrine is reiterated in *Lewis v. Worrell*, 185 Mass. 572. In *Chicago, R. I. & P. R. Co. v. Boyce*, 73 Ill. 510, an action by a passenger for loss of his baggage while in the warehouse of the railroad company, the question was what constituted a reasonable time or opportunity for the passenger to claim and take away his baggage. There the court said: "What constitutes such reasonable time and opportunity is a mixed question of law and fact, depending very much upon the peculiar facts of each individual case; but when the facts are undisputed it is purely a question of law, and the court should decide it."

In the case at bar there was no controverted question, and it follows that there was nothing to submit to the jury. The facts not being in dispute, the question of reasonable time was purely a question of law. The briefs of parties are silent as to what constitutes reasonable time under the circumstances in this case, and we are not asked to offer a suggestion on the question. However, in order that

Fluckiger v. Chicago & N. W. R. Co.

the litigation may be ended, we think it is well to say that, taking the record as it stands, and construing the contract in accordance with the usual rules of business, a tender was made within a reasonable time.

REVERSED AND REMANDED.

SEDGWICK and HAMER, JJ., not sitting.

ERNEST J. FLUCKIGER, APPELLANT, v. CHICAGO & NORTH-WESTERN RAILWAY COMPANY, APPELLEE.

FILED NOVEMBER 13, 1915. No. 18196.

Carriers: NEGLIGENCE OF LIVE STOCK: LIABILITY OF CARRIER. A shipper of live stock, furnished by an interstate carrier with transportation under a contract to care for, feed, water and unload his own stock when necessary, who actually accompanies his shipment on the train in which they are transported, and consents to and participates with the carrier in a violation of the federal statutes relating to such shipment, is not in a position to maintain a civil action for damages against such carrier, alleged to have been caused by such violation.

APPEAL from the district court for Holt county: R. R. DICKSON, JUDGE. *Affirmed.*

M. F. Harrington and Hugh J. Boyle, for appellant.

Lyle Hubbard, Wymer Dressler and A. A. McLaughlin, *contra.*

BARNES, J.

Action in the district court for Holt county to recover damages to an interstate shipment of live stock from Atkinson, Nebraska, to Chicago, Illinois, by reason of a failure to comply with the provisions of chapter 3594, 34 U. S. St. at Large, p. 607.

It was alleged in the petition, in substance, that the defendant company wrongfully and unlawfully kept 67 head of plaintiff's cattle, which constituted three carloads of the shipment in question, in the cars for 54 hours

without unloading and feeding them, and without water and food during all of said time; that they were thereby caused to shrink in weight, to plaintiff's damage and loss in the sum of \$659.49, for which amount he prayed judgment.

The defendant, by its answer, denied specifically and generally every allegation contained in the petition except those expressly admitted. It admitted that, on or about the time complained of, it was a carrier organized under the laws of the state of Illinois, and owned and operated a line of railway from Atkinson, in Nebraska, to Chicago, in Illinois, and was at that time, and is now, a common carrier for hire of freight and passengers over its said line of railway. It was further admitted that, on or about September 9, 1911, it received from plaintiff at Atkinson, Nebraska, for transportation to Chicago, Illinois, four carloads of cattle, and alleged that it forwarded the same to destination with all due haste and dispatch, and was without fault or negligence in handling or forwarding the shipment. Defendant further stated that it received said cattle under and by virtue of the terms of a written contract by which plaintiff agreed to load, feed, water, and take care of said stock in transit at his own expense and risk, and in consideration of such agreement, and to enable plaintiff to comply therewith, he was given transportation on the train in which said stock was transported to Chicago, Illinois; that he actually accompanied said stock in compliance with the agreement and assumed the duty of feeding, watering, looking after, and caring for the stock in transit; that if said cattle, or any of them, were injured in transit, the same was caused by reason of the failure or negligence of the plaintiff, and not by reason of the fault or negligence of the defendant. A copy of the contract was attached to and made a part of defendant's answer.

The cause was tried to a jury, and resulted in a verdict and judgment for the defendant. The plaintiff has appealed.

The act of congress cited by appellant (34 U. S. St. at Large, ch. 3594, p. 607) provides that a railroad company engaged in carrying or transporting cattle from one state to another shall not "confine the same in cars, boats, or vessels of any description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight; Provided, that upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours," and imposes a penalty upon the railroad company if the act is violated. These animals were confined for more than 36 hours, which constituted a violation of the act. The question presented is whether this plaintiff is in a position to recover damages from the defendant. The plaintiff accompanied this stock as caretaker under a written contract with the defendant, whereby he assumed the duty of feeding, watering, and caring for the stock in transit. He made no request of the company to unload the stock for feeding and watering, but testified upon the trial that the cattle were fed in racks provided for that purpose, and that he preferred to have the cattle taken through to the place of destination as rapidly as possible without unloading. It seems clear that where the shipper, as a caretaker, participates with the company in the course pursued, connives with and helps bring it about, he should not be permitted to recover damages thus occasioned to which he himself contributed. This was the view taken by the trial court, and the jury was so instructed.

The judgment of the district court is therefore

AFFIRMED.

FAWCETT and HAMER, JJ., not sitting.

MARY E. MCNAMARA, APPELLEE, v. WILLIAM C. MCNAMARA ET AL., APPELLANTS.

FILED NOVEMBER 13, 1915. No. 18349.

1. **Witnesses: CONFIDENTIAL COMMUNICATIONS.** Threatening letters by a husband to his wife while they are living apart in contemplation for a suit for divorce are not confidential communications.
2. ———: ———. Statements by one contemplating marriage, to his intended wife, as to the nature and extent of his property interests, are admissible in evidence in a proceeding to subject his property to the payment of a judgment rendered in an action for a divorce.
3. **Divorce: CREDITORS' SUIT: SUFFICIENCY OF EVIDENCE.** Evidence examined and found sufficient to sustain the judgment of the district court.

APPEAL from the district court for Brown county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

H. G. McIntire, E. C. Page and Alfred Pizey, for appellants.

R. E. Evans and M. F. Harrington, contra.

BARNES, J.

This was an action in the nature of a creditor's bill to subject the land of the defendant William C. McNamara to the payment of a judgment for permanent alimony and an allowance for the support of his infant children, rendered by the district court for Dakota county on January 4, 1912. The judgment was transcribed to the district court for Brown county, where the defendant's land was situated. Execution was issued thereon on the 17th day of June, 1912, and returned wholly unsatisfied. The action was commenced on the 8th day of July, 1912.

It was alleged in the petition that the judgment of the district court for Dakota county was in full force and effect, and had never been reversed, modified, superseded or appealed from; that there was due from William C. McNamara, to his wife, the sum of \$6,000 and interest,

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and in addition instalment sums aggregating \$300 and interest; that on June 17, 1912, for want of goods and chattels, execution was levied on the land in suit; that the decree is a valid lien on the defendant's land, subject to a first mortgage lien of \$10,000 and interest; that the mortgage for \$12,888.80, executed to defendant's brother, Cornelius, is fraudulent, void, and without consideration; that William C. McNamara and his brother, Cornelius J. McNamara, connived and conspired together to cheat and defraud the plaintiff out of the alimony which he, William C. McNamara, then owed her, and which had been allowed by the district court for Dakota county, Nebraska. Separate answers were filed by the defendants, admitting the entry of the decree of divorce of January 4, 1912, the filing of a transcript thereof in Brown county, Nebraska, the issuance of an execution thereon, but denied that the decree had not been appealed from, or that there was any fraud in the execution of the mortgage in question; alleged the *bona fides* of the indebtedness of William C. McNamara to his brother, Cornelius, resulting in the execution of the mortgage claimed to be fraudulent. Separate denials were filed by the plaintiff to the answers of the defendants. The cause was tried to the district court for Brown county, Nebraska, without the intervention of a jury, and resulted in findings and a judgment for the plaintiff. The defendants have appealed.

Appellants contend that the court erred in permitting the plaintiff, Mary E. McNamara, to testify against the defendant, who was her former husband, for the reason that the conversations in question constituted confidential communications between husband and wife.

The record discloses that plaintiff left her husband some considerable time before she commenced her action for divorce; that she resided at that time at her father's home in Dakota county, Nebraska. Plaintiff had informed her husband that she was about to commence her action. In response he wrote a letter to her, in which he stated, in substance, that if she commenced the action he would beat

her out of every dollar; that he would arrange it so that it would be lawed through the courts of Dakota county, and that she would be hauled into the United States courts. This was the letter which the trial court was asked to exclude. It appears that when this letter was written the parties were living apart, and were dealing with each other at arm's length. It cannot be claimed that this was a confidential communication between husband and wife. The court, therefore, did not err in refusing to exclude this letter. *Reed v. Reed*, 70 Neb. 779.

The other evidence to which objection was made was a statement to plaintiff by her husband, before they were married, that the ranch in Plymouth county, Iowa, was owned by himself and brother and he had a half interest therein. The evidence discloses that at the time they were residing on the Plymouth county ranch they were visited by defendant's brother, Cornelius, who lived in Montana, and in a conversation with plaintiff Cornelius told her that her husband owned an interest in the Plymouth county ranch. He said: "He does really own the place, but it was put in my name for protection, and I am willing to deed it back to him any time he wants it." He further said that if the ranch was sold he "would give my husband his share of it." We think this evidence was properly received.

It is next contended that this action was prematurely brought, and in support of this contention appellants cite section 47, ch. 25, Comp. St. 1911, which reads in part as follows: "A decree of divorce shall not become final or operative until six months after trial and decision except for the purpose of review, by proceedings in error or by appeal and for such purposes only, the decree shall be treated as a final order as soon as rendered." It will be observed that the decree was rendered on the 4th day of January, 1912, and this action was not commenced until the 8th day of July of that year. It follows that, so far as the rights of the parties were concerned, the decree at the time of the commencement of this action had become

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final, and was subject only to review or modification by appeal. It is true that the defendant William C. McNamara had appealed to the supreme court of this state, but no supersedeas was ever filed or allowed. The judgment was finally modified as to the amount of alimony, and it therefore cannot be successfully contended that the action was prematurely brought.

Finally, it is contended that the evidence does not support the decree. The testimony shows that when the Plymouth county ranch was sold it brought at least \$45,000. The plaintiff testified that she was told that it brought \$75,000, and there was evidence tending to show that William received \$5,100 from his brother, with which he settled a claim with his former wife; that he received \$10,000 from his brother, which was used in part payment of the purchase price of the land now in controversy, but as to any subsequent sums paid him by his brother the evidence is such that the trial court was justified in the conclusion that the mortgage executed by him to his brother on March 26, 1907, was without consideration, and was made and received with the intent to prevent the plaintiff from obtaining anything as the avails of her divorce suit, which as above stated, was commenced on March 7 of that year.

After a careful review of all of the testimony, we have reached the independent conclusion that the findings of the trial court are fully supported by the evidence, and we fail to see how a court of conscience could have rendered any different decree than the one here complained of. The judgment of the district court is therefore

AFFIRMED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

FRANK HOOKER, ADMINISTRATOR, APPELLEE, v. WABASH
RAILROAD COMPANY, APPELLANT.

FILED NOVEMBER 13, 1915. No. 18373.

1. **Railroads: TRESPASSER ON TRACK: CARE REQUIRED.** A person walking upon a railroad track at a point where there is no public crossing, and where pedestrians have no right to the use of the track, is a trespasser; and, if he is deaf, he is required to use extraordinary care and exercise his sense of sight to learn of the approach of trains.
2. ———: ———: **CONTRIBUTORY NEGLIGENCE.** In such a case, if the trespasser fails to use his remaining senses and is struck by an approaching train, he is guilty of contributory negligence, and, unless it is shown by a preponderance of the evidence that the engineer in charge of the train carelessly ran him down, the company is not liable for his injury or death.
3. ———: ———: **NEGLIGENCE.** Where the undisputed evidence shows that none of the train crew had any knowledge that an adult person walking upon the track was deaf, or was afflicted with any other infirmity, that the engineer used all proper signals to warn him of the approach of the train up to the instant when it appeared that he was not going to step off of the track, and at that instant did everything possible to stop the train and avoid a collision, it cannot be said that the engineer carelessly ran the pedestrian down.
4. ———: ———: **LAST CLEAR CHANCE.** The facts shown by the evidence set out in the opinion are not sufficient to warrant the application of the rule of the last clear chance.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Reversed and dismissed.*

John L. Webster and James L. Minnis, for appellant.

Earl R. Ferguson, C. R. Barnes and Harry W. Shackelford, contra.

BARNES, J.

Appeal from a judgment awarding the administrator of the estate of William Davies \$15,000 against the Wabash Railroad Company for alleged negligence in the killing of plaintiff's intestate.

It appears that the accident which caused the death of Davies occurred in Page county, in the state of Iowa, where the plaintiff was appointed administrator of the estate of the decedent. Thereafter the administrator commenced an action in the district court for Douglas county, in this state, and on the trial had a verdict and the judgment complained of.

It is appellant's first contention that because the statute of the state of Iowa was neither pleaded nor proved, authorizing a recovery for death by alleged wrongful act, no recovery could be had in this action. In other words, appellant contends that the courts of this state should not presume that the statute law of a sister state, in derogation of the common law, and which alone gives a right of recovery, is the same as the statute of this state. There is much force in this contention and there are respectable authorities which support it, but we prefer to base our judgment on another ground, and therefore decline to decide this question.

It appears that William Davies, on the 16th day of October, 1910, at about 3 o'clock in the afternoon, started from Coin, a little town in Page county, Iowa, to go to Blanchard, which was about six miles distant; both towns being situated on the line of the Wabash railroad. Decedent, without permission, license or invitation, started to walk along the railroad track on his way to the last-named town. After he had proceeded some distance, the second section of freight train No. 62, running from Council Bluffs to Stenberry, Iowa, approached him from the north, and, when distant about half a mile, the engineer sounded the whistle of the locomotive for a road crossing, to which Davies paid no attention. There is no dispute in this evidence.

H. E. Wilson, the conductor of the train, testified, in substance, that his train was made up of a locomotive and 10 or 12 cars; that the scheduled running time was from 10 to 12 miles an hour; that the train was behind time from one to one and a half hours; that he was riding

in the cupola of the caboose; that, after the freight train had passed around the curve at a point about a mile east of Coin, he noticed a man on the track ahead of the engine; that the engineer gave a road crossing whistle at a distance of about half or quarter of a mile before the engine reached the place where the accident occurred; that afterwards the engineer gave successive short blasts of the whistle; that from his position he could not see the man after the time when the engineer began giving these short blasts; that the engine struck the man and knocked him to the west side of the track; the train was backed up; the man was picked up by the brakeman and "myself" and put in the caboose; his arm and leg were broken, but he was still alive. The accident occurred between 3 and 4 o'clock in the afternoon on a bright, sunny day. The train proceeded to Blanchard, where Davies was taken into the waiting room of the depot, placed on a cot, and a doctor sent for. On cross-examination the witness testified that, when he saw Davies walking upon the railroad track, there was nothing about his appearance to indicate that he could not or would not get off of the track. The witness also testified that he applied the air by working an appliance in the caboose, after the engineer had applied the emergency stop.

J. G. Kinslow, the engineer, testified, in substance, that he first saw Davies when the engine had rounded the curve east of Coin, at which time he was about half a mile ahead of the train; that when he first saw him he whistled for the road crossing, and when he came close he gave what is known as the "stock whistle," consisting of short, sharp blasts of the whistle. When he ceased giving the whistles, the locomotive was probably from 50 to 100 feet away from Davies. He did not observe Davies pay any attention to the signals, and when he became aware of that fact he reversed the engine, applied the air and did all in his power to stop the train, but failed to bring it to a stop until after Davies had been struck. On cross-examination the witness testified that the train was equipped

with Westinghouse automatic air brakes, and that all the appliances of the locomotive and train for stopping were suitable and in proper condition; that there was nothing on either side of the right of way to have prevented Davies from stepping from the railroad track in time, and nothing to prevent him from seeing the train if he had looked; that the whistle which was blown could have been heard for a mile and a half; that, after he ceased giving the short blasts of the whistle, he instantly applied the air brakes; that from his experience in the railroad business he would say the stop made was a good one; that, when he observed Davies upon the track, he did not notice anything in his manner of walking to indicate that he was physically disabled, nor to indicate that he would not step off the track in time to avoid an accident; that Davies did not look back, but that there was nothing peculiar about him to arouse any suspicion as to his inability to avoid an accident; that at the time he applied the air brakes he put the engine in emergency.

A. V. Hughes, the locomotive fireman, testified, in substance, that he remembered the giving of the whistles, and that when they were stopped the brakes were applied. On cross-examination he further stated, in substance, that he was looking ahead as the train approached Davies and observed him until the time when the pilot of the engine struck him. There was nothing about his appearance which indicated that he was not aware of the approach of the train or that he did not know the train was coming. What the engineer, Mr. Kinslow, did, by way of setting the brakes and applying the air and using the sand, was the proper thing for him to do; that after he quit whistling he endeavored to stop the train as fast as he could.

W. L. Dunmire testified, in substance, that he was acquainted with Davies and saw him on the day of the accident; that they dined together that day, and after dinner they walked down to the Wabash railroad to a point where there was a dredge boat used in digging a ditch; that they remained there for 15 or 20 minutes, and from that point

Davies started to go to Blanchard on foot; that he went south to the railroad track, and after he got on the track he started south to the town of Blanchard; that he (Dunmire) heard the whistle of the locomotive, but was not where he could see the accident. The testimony shows that Dunmire cautioned Davies to be careful, as there were a great many trains passing along the railroad track about that time; that Davies said he "would have to keep a look-out for the train, keep his peepers open, because he had to use his eyes instead of his ears."

G. W. Means, a resident of Coin, who had been acquainted with Davies for 10 or 12 years, testified that he talked with him on the afternoon of the day he was killed; that Davies understood the lip language, or that, in other words, a man he was well acquainted with could talk to him in ordinary conversation, and he could generally repeat right after you what you said, and if it wasn't correct you shook your head and repeated it over, and then he would repeat it over right after you; that Davies said he came down on the morning train, and that he was going to Pan Dunmire's for dinner, and was going from there to the dredge boat, and was going to walk from there down to Blanchard. The witness testified that he said to Davies, "Billy, you want to be careful on the railroad track, for they are running a good many extras on the Wabash now, they might pick you up," and that Davies replied, "O, I am not afraid. I will be careful."

W. L. Annan testified that he saw Davies at Coin at the time when Means was present, and heard part of their conversation; that he had known Davies for 20 or 25 years and talked with him frequently; that Davies would watch one's lips when they were talking to him, and if he did not understand them he would so indicate, and if they would tell him over he would repeat it. The witness stated that Davies said: "I am going to Blanchard, by way of the dredge boat which was working near the tracks;" that Means had spoken to him about the extra

trains, and had said: "You had better be careful;" and that witness himself had said, "Billy, you want to be awful careful;" that, after Means had called his attention to Davies being deaf, he (Annan) told him he wanted to be awful careful, and that Davies had replied, "All right, I hain't afraid."

W. L. Dunmire, on being recalled, further testified that Davies had said he "would have to keep his eyes open for that train, because he had to depend on his eyes for his ears."

It was conceded that none of the train crew had any acquaintance with Davies or knowledge of his infirmity.

At the close of the evidence the defendant requested the court to direct a verdict in its favor, which request was refused. Defendant contends that this was prejudicial error, for the reason that plaintiff was not entitled to a verdict in his favor on the law and the facts of this case.

It clearly appears that plaintiff's decedent was totally deaf, and that he knew the necessity of using his sense of sight to protect himself from danger. Before he went upon the railroad track, he was cautioned by two of his friends and acquaintances to look out for the approach of trains. He responded that he would look out, because he had to use his eyes instead of his ears. He said: "O, I am not afraid. I will be careful." It therefore devolved upon Davies to use extraordinary care and exercise his sense of sight to learn of the approach of the train. *Toledo, P. & W. R. Co. v. Hammett*, 220 Ill. 9; *McIver v. Georgia S. & F. R. Co.*, 108 Ga. 306.

Davies was a trespasser upon the track, was deaf, and, having failed to use his remaining senses in order to ascertain the approach of the train, was clearly guilty of contributory negligence. Unless it was shown by a preponderance of the evidence that the defendant's engineer carelessly ran him down, no recovery could be had in this case. *Chicago, B. & Q. R. Co. v. Wymore*, 40 Neb. 645; *Chicago, B. & Q. R. Co. v. Grablin*, 38 Neb. 90; *Chicago,*

B. & Q. R. Co. v. Wilgus, 40 Neb. 660; *Omaha & R. V. R. Co. v. Cook*, 42 Neb. 577.

We are of opinion that the evidence in this case does not sustain the contention of the appellee that the defendant's engineer wilfully ran decedent down. It clearly appears that none of the agents or servants of the railroad company had any reason to suppose that Davies was deaf, and that he would not get off the track in time to avoid being struck by the engine; that, as soon as the engineer became aware of the fact that Davies would not get off the track, he immediately applied the air brakes, reversed his engine and sanded the track, in order to stop the train and avoid the collision. Therefore, it cannot be said that the engineer was guilty of a want of reasonable care. It must be remembered that the railroad company was entitled to have its track clear in order that it might operate its trains for the benefit of the public. The safety of the traveling public also demands that the right of way of the railroad company should be unobstructed. If the company owed a duty to run its trains with reference to trespassers upon the track, look out for them, slacken speed and promptly stop whenever they had reason to expect them to be upon the track, the public would suffer thereby. The railroad company, as a public servant, owes a duty to the public to give prompt and rapid transit to its patrons as carriers of both passengers and freight. An individual who is a trespasser cannot justly claim that the railroad company shall forget, even for any moment of time, its duty to the general public and look out for him who shall be, first, guilty as a trespasser, and, second, guilty of gross negligence in not looking out for himself. *Illinois C. R. Co. v. Eicher*, 202 Ill. 536. The rule of law is that, where a man walking upon the track is a trespasser, and is negligent in failing to keep a lookout for approaching trains up to the time of the accident, and there is nothing to prevent him from getting out of the place of danger by stepping off of the railroad track, the defendant company is not liable, unless its engineer

is guilty of a want of reasonable care under all the circumstances.

Appellee contends, however, that the right of recovery in this case depends upon the doctrine of the last clear chance. It is clear, however, from the great weight of authority, that in the case at bar the facts are not sufficient to invoke that doctrine. There was no time after Davies was discovered upon the track, up to the very minute when he was struck by defendant's engine, that he could not have avoided the injury to himself by merely stepping off the railroad track, and we think it cannot be said that he was discovered to be in a state of peril at any point of time before the engineer used his utmost endeavor to stop the train. *French v. Grand Trunk R. Co.*, 76 Vt. 441; *Carrier v. Missouri P. R. Co.*, 175 Mo. 470; *Green v. Los Angeles T. R. Co.*, 143 Cal. 31; *Holwerson v. St. Louis & S. R. Co.*, 157 Mo., 216; *Merritt v. Foote*, 128 Mich. 367; *Gilbert v. Erie R. Co.*, 97 Fed. 747; *Drown v. Northern O. T. Co.*, 76 Ohio St. 234; *Dyerson v. Union P. R. Co.*, 74 Kan. 528; *Dunlap v. Chicago, R. I. & P. R. Co.*, 87 Kan. 197; *Missouri P. R. Co. v. Prewitt*, 59 Kan. 734.

As we view the record, the district court erred in refusing to direct a verdict for the defendant. The judgment of the district court is therefore reversed, and the cause dismissed.

REVERSED AND DISMISSED.

SEDGWICK and HAMER, JJ., not sitting.

LUTHER C. WORLEY ET AL., APPELLEES, v. MATILDA INEZ WIMBERLY ET AL., APPELLEES; HENRIETTA GRIM ET AL., APPELLANTS.

FILED NOVEMBER 13, 1915. No. 18413.

1. **Wills:** CONSTRUCTION. In the construction of a will the intention of the testator, if it can be ascertained, must govern. Such intention

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should be ascertained from a liberal interpretation and comprehensive view of all of the provisions of the will.

2. ———: ———. Under provisions of the testator's will set out in the opinion, *held*, that he intended to convey to his widow only a life estate.

APPEAL from the district court for Butler county:
GEORGE F. CORCORAN, JUDGE. *Affirmed*.

R. D. Fuller, for appellants.

Hastings & Coufal, C. M. Skiles, F. H. Mizera, J. J. Thomas and N. Dwight Ford, *contra*.

BARNES, J.

This is an appeal from a judgment of the district court for Butler county. The purpose of the appeal is to obtain a construction of the will of one Joshua Worley, who was a resident of that county at the time of his death. The trial court construed the will in question to devise to the widow of the testator a life estate in his property. The appeal is prosecuted by the guardian *ad litem* of certain minor heirs of the testator who were made defendants in the action. The will, so far as it relates to the disposition of testator's property, after the introductory declaration, reads as follows:

"Second 2. I give and bequeath to my beloved wife, Eliza Jane Worley, all of my real estate (describing it).

"Third 3. And all the personal property of every description whatsoever moneys notes bankable paper of every description belonging to me at my death.

"Fourth 4th. And the said Eliza Jane Worley my beloved wife is to have the use of all lands and personal property so long as she lives or remains my widow but if she should marry then all property both real and personal shall be divided up equally between the children and at any time the property is divided and each child shall choose one man each and they shall divide the property equally and if the said Eliza Jane Worley wants to help any one of the children she can do so and it be charged up to their estate and taken out at final settlement — and

this settlement must be final and if any one of the children become dissatisfied and go to law he or she shall only be allowed one dollar as it is my will that there be no law suit in the settling up my estate.

"Fifth 5. And the said Eliza J. Worley my beloved wife is to let my son Luther have the farms on the same terms that he now has them or had them in the past years as long as he sees fit or till the final settlement is made.

"6 sixth. All houses and lots belonging to me at this time or in the future at my death shall belong to my beloved wife Eliza Jane Worley on the above conditions."

It is the contention of the appellants that this will devised to Eliza Jane Worley all of the estate of the testator in fee simple, and it is argued that the district court erred in construing it to devise to her only a life estate. It is argued by the appellants that the widow took the estate in fee simple, for the reason that it does not clearly appear that the testator intended to convey to her a lesser estate. In arriving at a satisfactory solution of the question, it must be observed that the notary public employed by the testator to draft the will was an inexperienced scrivener; that, notwithstanding that fact, the writer of the will was anxious to clothe it with all necessary formalities. Neither he nor the testator had a careful regard as to the rules of technical construction. It is argued, however, that by the terms of the first paragraphs in the will the testator devises all of his real and personal property to his wife, and that the same is not qualified by the clause which reads as follows: "And the said Eliza Jane Worley my beloved wife is to have the use of all lands and personal property so long as she lives or remains my widow." Several cases are cited from other jurisdictions in support of this contention. We think this court, however, has settled the question in the case of *Loosing v. Loosing*, 85 Neb. 66. It was there said: "The rule does not of necessity apply merely for the reason that the first clause considered by itself might be construed as conveying a fee simple. The later clause, or clauses, may be read in connection with

the first one for the purpose of advising the court whether it actually did transfer the fee, and if it does not in itself clearly and unequivocally do so, and by a comparison thereof with the remaining parts of the instrument the court is convinced that the testator did not in fact intend to vest the greater title in the first taker, the instrument will be construed accordingly. In other words, quoting Mr. Justice Strong in *Sheets' Estate*, 52 Pa. St. 257: 'Subsequent provisions will not avail to take from an estate previously given qualities that the law regards as inseparable from it, as, for example, alienability; but they are operative to define the estate given, and to show that what without them might be a fee, was intended to be a lesser right.' "

It is further contended by appellants that the intention to invest the widow with a fee simple is further evidenced by the clause by which it is stated by the testator that "if the said Eliza Jane Worley wants to help any one of the children she can do so and it be charged up to their estate and taken out at final settlement." We think this contention is unsound.

The sole and controlling question in the case is: What was the intention of the testator and by what method may it be determined? In *Clarke v. Boorman's Exr's*, 18 Wall. (U. S.) 493, Mr. Justice Miller said: "To these considerations it is to be added that of all legal instruments wills are the most inartificial, the least to be governed in their construction by the settled use of technical legal terms, the will itself being often the production of persons not only ignorant of law but of the correct use of the language in which it is written. Under this state of the science of the law, as applicable to the construction of wills, it may well be doubted if any other source of enlightenment in the construction of a will is of much assistance than the application of natural reason to the language of the instrument under the light which may be thrown upon the intent of the testator by the extrinsic circumstances surrounding its execution, and connecting the parties and

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the property devised with the testator and with the instrument itself."

The testator, when the will in question was drawn, and at his death, had a wife and three children, the objects of his bounty. He also had a half section of land and some personal property. He bequeathed his personal property and devised his real estate to his wife, in conclusion of which bequest and devise he declared: "And the said Eliza Jane Worley my beloved wife is to have the use of all lands and personal property so long as she lives or remains my widow." This seems to be clearly a limitation upon the extent of her estate in the real and personal property, and is a valid and effective limitation defining the extent of her estate.

There is some evidence in the record which tends to show that the widow had recognized that she was devised a life estate only.

Considering the evident intention of the testator, we are of the opinion that the district court correctly construed the will, and the judgment is therefore

AFFIRMED.

LETTON, J., I concur for the reason that, in addition to the portions of the will discussed in the opinion, there are other expressions which clearly indicate the testator's intention to give the wife a life estate only.

FAWCETT and HAMER, JJ., not sitting.

SAM BAILEN, APPELLANT, v. E. P. BADGER IMPORT COMPANY ET AL., APPELLEES.

FILED NOVEMBER 13, 1915. No. 18231.

1. **Appeal: MOTION FOR NEW TRIAL: SUFFICIENCY OF EVIDENCE.** This court will not, upon appeal, determine questions that were not fairly presented to the trial court. Ordinarily an assignment in the motion for new trial that "the judgment was erroneous because it was con-

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trary to law" will not be considered sufficient to challenge the attention of the trial court to the question of the sufficiency of the evidence to support the judgment. But when there is no substantial conflict in the evidence, and the sole question is whether upon the conceded facts the law will support the judgment, so that the court must have considered the sufficiency of the evidence in passing upon the motion for new trial, this court upon appeal should also consider that question and determine the case accordingly.

2. **Fraudulent Conveyances: SALES IN BULK.** The bulk sales law (Rev. St. 1913, sec. 2651) does not prohibit the transfer of an entire stock of goods to a creditor in payment of a pre-existing debt, or to a trustee for the benefit of certain creditors, but, in order to be valid, such a sale or transfer must comply with the requirements of that law.

APPEAL from the district court for Holt county: R. R. DICKSON, JUDGE, *Affirmed.*

W. K. Hodgkin, J. F. Power and Sears & Snyder, for appellant.

J. J. Harrington, contra.

LETTON, J.

On July 9, 1912, Chambers & Company, who for some years prior thereto had been in the retail merchandise business at Atkinson, finding themselves unable to meet their liabilities, executed and delivered to their principal creditor, C. Shenkberg Company, a corporation of Sioux City, Iowa, an instrument reciting that they "hereby sell, grant, convey and assign" unto the second party their stock of merchandise, consisting of dry goods, groceries, boots and shoes, etc.; also the furniture and fixtures used in connection with the stock. The instrument also transferred and assigned to the second party all their book accounts, bills receivable, and evidences of indebtedness. They constituted the second party their "agent, trustee, and attorney in fact, and in their place and stead, to take over, manage, run, and to continue said business, or to sell at public or private sale" all or part of the stock, fixtures and personal property conveyed. It was provided that, if the second party deem it advisable, they may keep up the stock by the purchase of new goods. The instru-

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ment recites that suits at law are pending to recover debts for goods, and that it is deemed best, for the purpose of keeping the assets together, "to place the business in such shape that all creditors of the same class will receive the same treatment with reference to the payment of their debt." It was further agreed that the second party, after disposing of the property, should pay all the expenses of carrying out the trust, including a charge for his services and for the services of his attorney, pay for new goods purchased, pay all taxes, rents and clerk hire now due, pay and discharge in full, if the residue of the funds is sufficient, all the debts, liabilities due and owing "to wholesalers, or other unsecured creditors of the same class, or such creditors as shall become parties hereto and file their claims or demands with the party of the second part." It is further recited that one of the considerations for the execution of this instrument is that the party of the first part shall be released and absolved from liability on any unpaid portion of the claims against them as to claims of creditors who accept this trust deed and indicate their acceptance thereof in the manner provided for, and that creditors who file their claims "shall execute an instrument in writing agreeing that the first party and the individual members of the firm shall be and stand released on any unpaid portion of the claims filed with the second party." The second party took possession of the stock and sent letters to the creditors inclosing a copy of the instrument and a blank form of acceptance and release. The defendant, the E. P. Badger Import Company, one of the creditors, paid no attention to this communication, but proceeded with an action which it had already begun and obtained judgment against Chambers & Company for the amount of its claim. The assignee concluded it would be advisable to sell the property at public sale, and this was done on August 8, 1912. On the next day the defendant obtained judgment for the sum of \$399.10 and costs. Execution was issued three days later and placed in the hands of defendant Grady, as sheriff of Holt county, who on the same

day levied the execution upon the goods as the property of Chambers & Company and took possession of the same. On August 15 plaintiff commenced the present action and retook the merchandise under a writ of replevin. The case was tried without the intervention of a jury, and from the findings and judgment in favor of defendant, plaintiff appeals.

Defendant insists that plaintiff is not in a position to question the judgment on appeal, for the reason that in his motion for a new trial his only assignment was that the judgment "was erroneous because it was contrary to law." The office of a motion for new trial is to give the trial court an opportunity to correct errors. When the record is complicated and many questions are presented and decided upon the trial, an assignment in the motion for new trial that the judgment is contrary to law may not challenge the attention of the court to the errors relied upon and give opportunity to correct them. It is generally held that such assignment is not sufficient to call attention to the sufficiency of the evidence to support the judgment. When, however, the record shows that there is no substantial conflict in the evidence, and that the sole question is whether upon the conceded facts the law will support the judgment, and that the court must have considered the sufficiency of the evidence in passing upon the motion for new trial, this court upon appeal should also consider that question and determine the case accordingly. Technical rules intended to secure the substantial rights of the parties are not to be strictly enforced when it is manifest that their application would defeat, rather than promote, justice. This matter is more fully discussed in the opinion in *Waxham v. Fink*, 86 Neb. 180.

Defendant also contends the assignment constitutes a sale in bulk and is void as to creditors, for the reason that it was made without compliance with the provisions of section 2651, Rev. St. 1913. This section provides: "The sale, trade or other disposition in bulk of any part or the whole of a stock of merchandise, otherwise than in the

ordinary course of trade and in the regular and usual prosecution of the seller's business, shall be void as against the creditors of the seller," unless certain provisions with respect to the making of an inventory of the goods and a list of the creditors and the giving of notice to such creditors be complied with. It is conceded that the requirements of this statute were not followed, and it is contended by the appellant that such a transfer for the benefit of creditors who release their claims is not embraced within the prohibition of the statute. It will be noticed that the statute specifically prohibits a disposition in bulk "otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business." The appellant contends that in this state it is lawful for a debtor to prefer any one or more of his creditors, that the assignment was made in good faith, with no intention of evading the provisions of the law, and was not in violation of its spirit or intent. By the terms of the assignment no creditor was entitled to share in the proceeds unless he accepted, or agreed to accept, a possible *pro rata* payment in full of his demand, and released the individual members of the partnership from liability for any balance that might exist. A creditor who refused these terms could receive nothing, and thus would be prevented from receiving the benefits the legislature intended by the passage of the bulk sales law. The debtor sought to compel each creditor to accept a share of the proceeds of the firm assets, and to release a valid claim against the individual members of the partnership.

A similar question was considered by the supreme court of Massachusetts (in which state, as in this, debtors may lawfully prefer creditors) in a case where an insolvent debtor in that state transferred his stock in bulk to a *bona fide* creditor without compliance with the bulk sales law of that state, which is substantially the same as that of this. After holding that the transfer might be valid by way of accord and satisfaction as between the debtor and creditor themselves, the court say:

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"But the transaction had another phase, so far at least as respected Kopec's other creditors. There was a change in the ownership of the property, which, if valid as against them, freed from liability property which theretofore could have been attached by them; and thus their security was impaired. While it is true that in its strictest sense a sale is a transfer of personal property in consideration of money paid or to be paid, still in the interpretation of statutes it is often held to include barter and any transfer of personal property for a valuable consideration. * * * We are of the opinion that the statute in question was intended to prevent a trader from disposing of his stock of merchandise in a manner outside his usual course of business, so that the same should be taken away from his creditors in general, and that the transfer under the circumstances disclosed in this case was a sale, although made to a creditor." *Gallus v. Elmer*, 193 Mass. 106.

Construing a similar statute, the supreme court of Georgia, in *Sampson v. Brandon Grocery Co.*, 127 Ga. 454, said: "Construing the act of 1903 and section 2697 together, we may easily reach the conclusion that sales of stock in bulk by a debtor to a creditor, in extinguishment of his debt, in whole or in part, are still permissible, but that such sales are null and void unless there be compliance with the terms of the act of 1903." (Bulk sales law.) In discussing the matter the court suggested that, if the value of the goods exceeded the amount of the debt and the excess was paid in cash or by the giving of a promissory note, could it be said that such a transaction would not be within the statute? And that, if such a sale for acquittance of the debt and an additional consideration comes within the act, why should a sale in extinguishment of the debt be excluded?

To the same effect are the cases of *Humphrey v. Coquillard Wagon Works*, 37 Okla. 714, and *Youghioghenny & Ohio Coal Co. v. Anderson*, 152 N. W. (Mich.) 1025. The object of the statute is pointed out in the cases followed,

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which is the protection and benefit of all creditors. The legislature was of the opinion that a disposition of a stock of goods otherwise than in the usual course of business interferes with the just rights of creditors. If the provisions of the law are followed, the end attained will be to put creditors more nearly upon an equality than before with respect to the collection of claims, in cases of a disposition of a whole stock. The supreme court of Washington seem to take a contrary view, but we believe the rule adopted by other courts is more in accordance with the purpose and intention of the legislature.

It has been suggested that by remaining silent and making no objections to the assignment and sale the defendant was estopped to proceed against the goods. But there could be no estoppel, because by the very terms of the assignment no creditor could be bound by it unless he filed a claim with the trustee, and, in addition, filed a release of the debtor for all liability for his debt in excess of any dividend received. Under such a provision notice by a creditor that he did not or would not agree to the assignment was unnecessary. His silence could not give consent. On the contrary, it clearly indicated his nonassent and his purpose to rely on the legal proceedings he had instituted. The purchaser at the trustees sale was bound to take notice of the title he was buying and of the limitations of the instrument. He could not be an innocent purchaser under the circumstances.

The judgment of the district court is

AFFIRMED.

HAMER, J., concurring.

The dissent of Judges Fawcett and Sedgwick might be supported without doing any great violence to the principles of law applicable to the facts. The justice of the plaintiff's claim has much to commend it. This is one of those cases where arguments may be found on either side. When Chambers & Company found themselves unable to meet their liabilities, they executed and delivered to one of

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their creditors, a corporation, C. Shenberg Company, an instrument reciting the sale and conveyance of their stock of merchandise, and also their furniture and fixtures and all book accounts and bills receivable, together with other evidences of indebtedness. They undertook to create the corporation mentioned their agent, trustee, and attorney in fact to manage and continue the said business or to sell all the property conveyed. The purpose appears to have been that all creditors of the same class might receive the same treatment with reference to the payment of their debts. It was one of the considerations for the execution of the instrument made that said Chambers & Company be released from liability on any unpaid portion of the claims against them as to the claims of such creditors as accepted the trust deed and indicated acceptance thereof. Such of the creditors as accepted the trust deed were by the terms of the said instrument to execute a release on any unpaid portion of the claims filed with the trustee. The corporation to which transfer was made took possession of the stock, sent letters to the creditors notifying them of the transfer, and including a blank form of acceptance and release. The E. P. Badger Import Company, one of the creditors, disregarded the communication and prosecuted an action, which it had already commenced, and obtained a judgment against Chambers & Company for the amount of its claim. The assignee sold the property at public sale August 8, 1912. The defendant, the E. P. Badger Import Company obtained its judgment for \$399.10 and costs, and then issued an execution and placed it in the hands of the sheriff of Holt county. He levied the execution upon the goods sold as the property of Chambers & Company and took possession of the same, and then the plaintiff commenced this action and retook the merchandise under a writ of replevin. The court made findings and rendered a judgment in favor of the defendant, the E. P. Badger Import Company. The plaintiff appeals from this judgment.

It is claimed by the defendant that the plaintiff is not in position to question the judgment on appeal, for that in his motion for a new trial his only assignment was that the judgment was erroneous because it was contrary to law. The dissenting opinions contend that the office of a motion for a new trial is to give the trial court an opportunity to correct errors; that an assignment in the motion for a new trial alleging that the judgment is contrary to law may not challenge the attention of the court to the error relied upon, and so may give no opportunity to correct them; that such an assignment would not be sufficient to call the attention of the court to the sufficiency of the evidence to support the judgment. It is said in the majority opinion: "When, however, the record shows that there is no substantial conflict in the evidence, and that the sole question is whether upon the conceded facts the law will support the judgment, and that the court must have considered the sufficiency of the evidence in passing upon the motion for new trial, this court upon appeal should also consider that question and determine the case accordingly." It is also said in the majority opinion that technical rules are not to be strictly enforced when it is manifest that their application would defeat justice rather than promote it. An authority is cited, and this view would seem to be correct.

It is further said in the majority opinion that the assignment constitutes a sale in bulk, and is void as to creditors, for the reason that it was made without compliance with the provisions of section 2651, Rev. St. 1913. The act in question provides for an inventory of the goods and a list of the creditors and the giving of notice to such creditors. The statute prohibits a disposition in bulk "otherwise than in the ordinary course of trade." The appellant claims that in this state it is lawful for a debtor to prefer any one or more of his creditors; that in this case the assignment was made in good faith, with no intention of evading the provisions of the law; and that it is not in violation of the spirit of the law. It will be noticed that

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no creditor was entitled by the terms of the assignment to share in the proceeds of the the sale unless he accepted, or agreed to accept, a *pro rata* share in full of his demand. He was also required to release the individual members of the partnership from any liability for any balance.

It is said in the majority opinion that the statute in question was intended to prevent a trader from disposing of his stock of merchandise in a manner outside of his usual course of business. I do not think the bulk sales law is in any way applicable to this case. I do not think it is required that it should be considered. If the property was sold and the defendant stood by while the trustee sold it and made no objection, it is in no condition to levy on the stock of goods for the satisfaction of his judgment, unless it in some way indicated that the arrangement made was not acceptable to it. If it did that, and executed no release, and did not indicate in any other way that it accepted the manner of settlement proposed, then it was at liberty to take its judgment and cause a levy to be made upon the property. It did that, and the property was taken away from the sheriff by a writ of replevin and by one who was a party to the execution of the transfer. As the defendant did not acquiesce in the arrangement made and did not release the debtors or agree to release them, it is not bound. The defendant could not be estopped, because it could not be bound unless it agreed to the contract made. When the defendant did nothing tending to show its consent to the agreement, it thereby indicated that it did not assent. Something affirmative was required of it before it could be bound.

The purchaser at the trustee's sale could only take such title as his grantor had to give him. In this case the grantor had no title because of the infirmity of the proceedings and the failure of all of the creditors to come into the arrangement and join in the contract. The purchaser therefore is without title. He cannot claim to be an innocent purchaser. He knew that there was a defect in the title.

He knew that he was only getting such title as the trustee had to convey to him. It is therefore proper to affirm the judgment of the district court.

SEDGWICK, J., dissenting.

A debtor cannot compel his creditors "to accept a share of the proceeds of the firm assets." The majority opinion ably and laboriously establishes that proposition. A debtor may induce his creditors to agree to a fair and equitable distribution of all the assets. If a creditor consents to a sale of all of the assets of his debtor at public auction, and a purchaser at such sale has reason to believe and does believe that the creditor has consented to the sale, and so pays full value for the assets, such creditor ought not afterwards to be allowed to assert any claim against the goods so purchased. There is apparently no controversy as to the facts in the case. The business of the debtor was in a very bad condition. There were about 40 creditors, one of whom had a claim more than the total value of the assets. Some of the creditors, including this defendant, had begun litigation on their claims. The debtor could take advantage of the bankruptcy law, and so compel all creditors to take a *pro rata* portion of the assets and cancel their claims. The expenses of such proceedings would exhaust substantially all of the assets and leave little or nothing for any creditor. It was thought that the creditors would, under the circumstances, agree to a more reasonable remedy; whether they had suits pending or had judgments or had taken no action on their claims could make no difference. Every other creditor was fully notified of every step in the proceedings. Other creditors who had suits pending also consented to the sale at auction by making no objection to the proceedings. When they learned of the transfer in trust for all creditors, they might at once have attached the goods, or if they remained silent with full notice of the contemplated sale, and so estopped themselves to claim the property itself, instead of the proceeds thereof, they might still have attached the proceeds in the

hands of the trustee. Either of these courses would have raised the question of the application of the bulk sales law, and would have made its discussion necessary. Not having taken either of these remedies, they could have presented their claims to the trustee in accordance with the arrangement. It was clearly intended by all parties that the creditors would present their claims to the trustee for the *pro rata* share when the property was sold and the money in the hands of the trustee for distribution. The assignment to the trustee for the benefit of the creditors is clear upon this point. About 39 creditors took that course, and after this plaintiff had paid full value for the goods, and while the money was in the hands of the trustee, one undertook to take the goods from the purchaser at the sale. But the majority opinion says: "There could be no estoppel because by the very terms of the assignment no creditor could be bound by it unless he filed a claim with the trustee, and, in addition, filed a release of the debtor for all liability for his debt in excess of any dividend received." That is, a creditor could remain silent and make no objection to the sale, because he did not file his claim with the trustee before there were any funds in his hands to distribute. When should he "release the debtor for all liability?" When the goods were turned over to the trustee to be sold for all the creditors, it devolved upon the creditors to consent or object to the proposed sale and distribution. If they consented, there was nothing for them to do until the proceeds of the sale were in the hands of their trustee, when they could present their claim and release.

In Nebraska a man can assign his property for his creditors without complying with the assignment act. If he does, it will be valid, unless it is fraudulent. That is, unless he attempts directly or indirectly to keep some of the property for himself. If he does that it is fraudulent and void. If it is all to go to his creditors, it makes no difference whether he treats them all alike or not, since he has the right to prefer creditors. If he assigns to one creditor

more than enough to pay his claim, and expects to get some advantage to himself by so doing, such assignment would be void. All of the above propositions are decided in *Meyer v. Union Bag & Paper Co.*, 41 Neb. 67, and the many cases there cited.

The questions in our case are: (1) Can the creditors and the debtor agree to sell the debtor's property and divide the proceeds prorated among the creditors? (2) If the debtor proposes to do so, and asks the creditors to agree that he may, and 39 out of 40 creditors agree to it, do the common rules of estoppel apply to the fortieth creditor who allows the others to suppose that he consents also? (3) Will a purchaser at the sale who pays full value for the property, supposing that the creditors are selling it, be protected in his title, as against a creditor who purposely allows the purchaser to suppose that as one of the creditors he is making such sale?

FAWCETT, J., dissenting.

In addition to what is said by Judge Sedgwick in his dissenting opinion, I desire to suggest the following: The bulk sales law was designed to prevent the fraudulent secret selling of a stock of merchandise by a failing debtor, for a consideration paid to the debtor, and thus fraudulently taken from his creditors. The purpose of the statute was to require notice to the creditors before any transfer could be made outside of the regular course of business. The transaction by Chambers & Company, in turning their stock and business over to C. Shenkberg Company, was not a sale, nor a mortgage, nor an assignment for the benefit of creditors under the statute. It amounted to nothing more than the constituting of C. Shenkberg Company as their trustee for the purpose of making a sale and distributing the proceeds thereof among their creditors. There never was a sale of the stock of Chambers & Company until the public sale made by C. Shenkberg Company to plaintiff. Of this sale all of the creditors of Chambers & Company had received due notice

in writing and had been fully advised of the precise capacity in which C. Shenkberg Company was assuming to sell the property of Chambers & Company. While in some technical respects the bulk sales law was not literally complied with, there was a substantial compliance therewith. Everything was done openly and upon due notice. There was not even a semblance of secrecy or fraud in the actions of either Chambers & Company or C. Shenkberg Company. To put such a construction upon the bulk sales law as is given in the majority opinion, will be to defeat the beneficent purpose of that law. Such a construction will prevent an honest merchant who finds that his business enterprise has not been a success and that failure is inevitable, and who earnestly desires that his creditors shall receive as much as possible on their just claims, from turning his property over to one of them with instructions to take charge of it, and, without the heavy cost and long delay of a court proceeding, sell it and distribute the proceeds among all of his creditors, *pro rata*, imposing only the condition which the bankruptcy court would give him without request, that those who participate in the distribution of the money arising from the sale of his stock shall release him from further liability. The majority opinion will prevent such honorable and inexpensive procedure. This leaves no alternative for the honest failing debtor except to either turn his stock over to the court of bankruptcy, or by a statutory assignment apply it as far as it will go, and go out into the world burdened with debts which will forever stand as a barrier to his resuming business. This was not the intention of the legislature, and is not a proper construction of the bulk sales law.

BARNES, J., concurs in above dissent.

THOMAS B. STOCKER, APPELLANT, v. NEMAHA VALLEY
DRAINAGE DISTRICT NO. 2, APPELLEE.

FILED NOVEMBER 13, 1915. No. 18315.

Eminent Domain: DRAINS: ASSESSMENT OF DAMAGES: SPECIAL BENEFITS.

In determining whether property not taken for the excavation of a drainage ditch is damaged by the construction of the ditch, it is improper to consider general benefits affecting the community. If the property not taken is enhanced in value by reason of the construction of the ditch, such increase in value is a special benefit as to the particular property, and not a general benefit, notwithstanding the value of other property within the drainage district is also enhanced by reason of the improvement.

APPEAL from the district court for Nemaha county:
JOHN B. RAPER, JUDGE. *Affirmed.*

T. R. P. Stocker, for appellant.

Kelligar & Ferneau, contra.

LETTON, J.

This is an appeal from an assessment of damages in condemnation proceedings brought for the location of a drainage ditch. The plaintiff is the owner of a large tract of land in the valley of the Nemaha river, a little over 300 acres of which is within the limits of the drainage district. In the construction of the ditch it became necessary to run the main channel and a lateral ditch through the plaintiff's land. There was a general verdict and judgment for plaintiff for \$1,151.96. Plaintiff has appealed. The jury made special findings of fact to the effect that 21.38 acres of land had actually been taken for the ditches, that this land was worth \$45 an acre, and that there were no consequential damages to the land not taken. No complaint is made as to the findings as to the number of acres actually taken or the amount allowed as the value of the same, but the appeal is concerned with the right to recover for consequential damages to the remainder of the tract.

The first error assigned is that the court erroneously instructed the jury as to the measure of damages. Evidence with respect to the cost of bridges over the ditches had been received. Speaking of this evidence, the court said: "This evidence is proper to be considered by you, but you are not to take it or consider it as a basis or ground upon which to award damages. Such evidence is competent to be considered along with all the other evidence in deciding whether or not the market value of the plaintiff's land not taken has been depreciated by the construction of the channel or ditch. * * * If the residue of the plaintiff's land has not been depreciated, but would sell on the market for as much, or more, than the same land would have sold for, prior to the construction of the ditch, the plaintiff has suffered no consequential damages, and he would be entitled to recover only for the value of land actually taken and used in the construction of the ditch." The jury were told by other instructions given at plaintiff's request that in determining whether the land had been damaged they might consider the size of the farm, the purpose for which it was used, the improvements and how they were located, the location of the ditch and embankments and how they cut the land, the inconvenience of having the land cut into tracts, and in crossing the ditches, the size and depth of the ditches, and whether the location of the drainage improvements will render the farm more or less attractive to buyers, etc. It is also complained that the jury were erroneously instructed that the value of special benefits to the tract in excess of the amount plaintiff had paid as assessed for the cost of construction might be set off against consequential damages; that the court refused to instruct, "All general benefits are excluded from your consideration, and by a general benefit is meant one which is enjoyed, not alone by the plaintiff, but by the property owners along the line of the drainage district;" refused to instruct that, if the ditch intersected any way by which the plaintiff had access to a part of his farm, they should allow

plaintiff as part of his damages the reasonable cost of construction of a suitable bridge; and refused to instruct that, as a matter of law, the duty devolved upon the defendant to make and maintain suitable bridges and crossings over any private roads upon the land.

There is a radical difference between the conception of plaintiff and defendant regarding the law covering the recovery of consequential damages where land has been taken for a drainage ditch. The view of the district, which was adopted by the court, is, that, where the land has been benefited by the construction of the ditch to an amount in excess of its assessment for the cost of construction, these excess benefits may be set off against consequential damages, and that, since the market value of his land was increased by the enterprise more than the consequential damages sustained, plaintiff suffered no pecuniary loss for which damages can be recovered. Plaintiff takes the position that, in the case of a drainage district, general benefits are those which are enjoyed, not alone by the landowner through whose premises the ditch is run, but those which are enjoyed in common by all the proprietors of the land within the district.

The court was right in refusing to charge that "general benefits" are those which are enjoyed, not alone by the plaintiff, but by the property owners along the line of the ditch. Proprietors along the line of the ditch have received substantial benefit by its excavation draining the land of surplus water, preventing overflows, and permitting crops to be grown where it was impracticable to do so before. These are special benefits. They share, in common with other landed proprietors along or near the boundaries of the district, general benefits, in the increased healthfulness and salubrity of the surroundings, the ability to use the public roads at a time when, if undrained, the roads would be impassable, the removal of swamps or low and wet places, fit breeding ground for malaria-carrying mosquitoes and other pests, and in the general desirability of the vicinity as an abiding place.

Such benefits are not subject to set-off under the rule in this state. We said in *Kirkendall v. City of Omaha*, 39 Neb. 1: "The term 'special benefits' implies benefits such as are conferred specially upon private property by public improvement, as distinguished from such benefits as the general public is entitled to receive therefrom. In common with the general public, the owner of adjacent property is entitled to travel upon an improved highway, and although by reason of the improvement such travel may be rendered easier or more pleasant, yet the benefit is general, because it is enjoyed by the public in common with the owners of adjacent property. If the improvement should result in an increase in the value to adjacent property, which increase is enjoyed by other adjacent property owners as to the property of each exclusively, the benefit is special, and it is none the less so because several adjacent lot owners derive in like manner special benefits each to his own individual property. Such fact, if it exists, in no respect decreases the increment in value enjoyed by any one of the adjacent property owners, and by way of offset such increment should therefore be treated as a special benefit in favor of whomsoever it may arise." See, also, *Chicago, K. & N. R. Co. v. Wiebe*, 25 Neb. 542; *Lowce v. City of Omaha*, 33 Neb. 587; *Omaha Southern R. Co. v. Todd*, 39 Neb. 818; *Martin v. Fillmore County*, 44 Neb. 719; 4 Words and Phrases (1st ed.) p. 3056. After consideration of the cases cited by plaintiff and a search for others, the writer has been unable to find that any court has ever differentiated the nature of general and special benefits in condemnation proceedings by a drainage district from those in proceedings instituted for railway, irrigation or highway purposes. The district court properly followed the established rule.

The complaint that the court erred in refusing to instruct that, if the ditch intersected any way by which the plaintiff had access to his farm, they should allow as part of his damages the reasonable cost of construction of a suitable bridge, is not well taken. The court expressly

told the jury that such evidence is proper to be considered in deciding whether or not the market value of the land not taken has been depreciated by the construction of the channel, and, as plaintiff admits, treated the cost of building bridges as an element of damages. It would have been better to have omitted the statement that the evidence as to the cost of the bridge is proper to be considered, "but you are not to take it or consider it as a basis or ground upon which to award damages;" but, since they were also told that the inconvenience of reaching the land cut off by the ditch was an element of damages for them to consider, we think no prejudice could result.

As to the complaint that the court erred in refusing to instruct that, as a matter of law, the duty devolved upon the defendant to make and maintain suitable bridges over any private roads upon the land, the requested instruction was foreign to the issues, and inconsistent with that just mentioned tendered by the plaintiff.

The evidence clearly shows that the value of the land has been increased from an average value of about \$40 an acre to a value of from \$85 to \$100 an acre; that in some years before the ditch was dug the farm was almost entirely overflowed, in others the water covered large portions of it; and that the general effect of the drainage improvements has been to render the land much more valuable. It appears, however, that the excavation of the ditches has necessitated lengthy detours in order to reach portions of the land lying on the other side of the ditches from the two dwellings on the farm, and that a small tract of two or three acres is practically inaccessible without a small bridge. The evidence as to the cost of bridges varies from \$75 to \$200 for a bridge across the lateral and from \$500 to \$1,600 for the cost of a bridge across the main ditch, the difference being owing to the material and manner of construction. There is testimony that there are about 200 wooden bridges in the county over similar openings constructed according to the lower estimate. The higher estimates are for steel bridges set upon steel piling.

The inconvenience of access seems to constitute the only consequential damages suffered. Technically speaking, the jury should have found that damages had occurred to some amount, and should have offset the excess special benefits against the damages found (*Gutschow v. Washington County*, 74 Neb. 794,800); but, since the evidence shows that the special benefits in excess of what the plaintiff paid as his share of construction very largely exceed the damages proved, no prejudice to the plaintiff has resulted, and the case will not be reversed for that reason alone.

Plaintiff argues that since, in order to render his land more readily accessible, he will be compelled to build these bridges, while his neighbor within the drainage district, whose land is not intersected by the ditch, receives the same benefits in the increased value of his land but is not subject to this expense or the alternative inconveniences of access, the benefits are unequally apportioned and the rule which allows such a result is unjust. This is true to some extent, but in the construction of public improvements it is impossible to adjust damages or benefits with mathematical exactness so that each landowner within the district may be treated exactly alike. A farmer whose land lies outside of but adjoins the boundary of the district may be largely benefited by the drainage of the valley, and yet he is not compelled to pay any part of the cost of the improvement. A railroad may make cuts and fills on one man's land and practically spoil his farm, while it may not touch the land of his neighbor, and yet, by the location of a station close by, the value of the neighbor's land may be quadrupled. And so with a street; when a new street is opened the adjoining owners usually receive a large increase in the value of the land abutting upon the street, while other proprietors equally meritorious receive no benefit whatever. Human machinery for administering justice does not work infallibly, and it is impossible to make a rule that will do equal and exact justice in all cases. The principles which have been

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adopted by the courts with regard to the ascertainment of consequential damages seem to furnish the best general rules for doing justice that experience has devised. What is said, however, does not apply to the apportionment of special benefits in the first instance.

It is clear that the plaintiff has suffered no pecuniary damage to the land not actually taken by the ditch.

We find no prejudicial error. The judgment of the district court is

AFFIRMED.

HAMER, J., not sitting.

ALDEN MERCANTILE COMPANY, APPELLEE, v. JOHN A.
RANDALL, RECEIVER, APPELLANT.

FILED NOVEMBER 13, 1915. No. 18369.

Judgment: ENFORCEMENT: INJUNCTION: PETITION. To justify the interposition of a court of equity to enjoin a judgment in a case in which it is claimed that there was a defective service of process, it must appear that a valid defense exists to the merits of the original suit, and the plea to be good in this respect must state the facts so that the court can determine whether, if proved, they constitute a defense.

APPEAL from the district court for Grant county: JAMES N. PAUL, JUDGE. *Reversed.*

Burkett, Wilson & Brown, for appellant.

D. F. Osgood, *contra*.

LETTON, J.

This action was brought to restrain the defendant, who is the receiver of an insolvent insurance company, from procuring an execution to be issued and levied upon the property of plaintiff on the ground that the judgment upon which the execution is based is void, being rendered with-

out jurisdiction. Defendant filed a general demurrer to the petition, which was overruled. He elected to stand upon the demurrer. Judgment was rendered upon the pleadings granting the relief sought. Defendant appeals.

In substance, the petition alleges that the plaintiff is a resident of Grant county; that the defendant, acting as receiver for the Nebraska Mercantile Mutual Insurance Company, brought suit against the plaintiff in the district court for Lancaster county and caused a pretended summons to be issued and served upon the defendant in Grant county; that plaintiff never appeared in the action; that the action was upon a claimed liability as a policy holder of the insurance company, and "there was no joint liability averred, claimed or existing between this plaintiff and the other defendants named in said action, nor between any of the defendants in said action, but a several liability was averred, and a several judgment asked against this plaintiff and each and all of the defendants;" that the service of summons in Grant county conferred no jurisdiction upon the district court for Lancaster county; that the district court for Lancaster county rendered a several judgment against the plaintiff; that the pretended judgment is a cloud upon the title to his real estate; that he has no adequate remedy at law; "that said pretended judgment is absolutely null and void; and that plaintiff was at no time indebted to the defendant in any sum whatsoever."

The demurrer admits all the material facts stated in the petition to be true. These are: That in the original action no joint liability between plaintiff and any other defendant was averred or was existing; that no summons was served upon him in Lancaster county; that he never appeared in the action; and that he was at no time indebted to defendant in any sum whatsoever. It is argued by defendant that there is no allegation in the petition that plaintiff had any defense upon the merits of the case in Lancaster county, and that therefore, under the rule in *Fickes v. Vick Bros.*, 50 Neb. 401, "In an action to enjoin the enforcement of a judgment, relief should not be

granted because of the service of an unauthorized summons upon which such judgment was rendered, in the absence of a showing of the existence of a defense to the cause of action which formed the basis of the judgment assailed," it does not state a cause of action.

The question presented is whether the closing allegation, "that plaintiff was at no time indebted to defendant in any sum whatsoever," states a defense to the original action. The cause of action is alleged to have been "upon a claimed liability as a policy holder of the Nebraska Mercantile Mutual Insurance Company." In an action brought by the receiver of the mutual insurance company, does such an answer state a defense? It might be true that plaintiff was not indebted to the receiver, and yet all the facts set forth in the petition might also be true. Moreover, the allegation is a mere conclusion without disclosing in any way what the real defense was that plaintiff had in mind. He might defend on the ground that he was not indebted to the receiver because there were no outstanding debts of the corporation for which it was necessary to assess the policy holders, or on the ground that the appointment of Mr. Randall was defective or made without jurisdiction, and therefore he was not indebted to him. A defense upon the merits of the original suit is not alleged, and therefore no cause of action is set forth in the petition. We have repeatedly held that, in order to authorize the enjoining of a judgment, it must appear that there is a valid defense to the cause of action on which the judgment was based. *Wilson v. Shipman*, 34 Neb. 573; *Janes v. Howell*, 37 Neb. 320; *Woodward v. Pike*, 43 Neb. 777; *McBride v. Wakefield*, 58 Neb. 442. This is the general rule. *Brandt v. Little*, 47 Wash. 194, 14 L. R. A. n. s. 213, and note.

No such defense has been pleaded, and the court erred in overruling the demurrer. Its judgment is therefore

REVERSED.

SEDGWICK and HAMER, JJ., not sitting.

T. L. MARRIN, APPELLEE, v. JOHN A. RANDALL, RECEIVER,
APPELLANT.

R. N. HAYWARD, APPELLEE, v. JOHN A. RANDALL, RECEIVER,
APPELLANT.

E. G. MARTZ, APPELLEE, v. JOHN A. RANDALL, RECEIVER,
APPELLANT.

FILED NOVEMBER 13, 1915. Nos. 18368, 18370, 18371.

APPEAL from the district court for Grant county: JAMES
N. PAUL, JUDGE. *Reversed.*

Burkett, Wilson & Brown, for appellant.

D. F. Osgood, *contra*.

LETTON, J.

These cases involve the same question decided in *Alden Mercantile Co. v. Randall*, ante, p. 44, and for the reasons set forth in that opinion the judgment of the district court is

REVERSED.

WISE MEMORIAL HOSPITAL ASSOCIATION, APPELLANT, v.
LACEY E. PEYTON, APPELLEE.

FILED NOVEMBER 13, 1915. No. 18416.

Husband and Wife: NECESSARIES: LIABILITY OF HUSBAND. A husband who is living apart from his wife and is paying temporary alimony awarded to her by the court in a suit for divorce is not liable to a third person for necessities furnished to her, the former being chargeable with knowledge of those facts, and the adequacy of the temporary alimony not being subject to question by a stranger.

APPEAL from the district court for Douglas county:
GEORGE A. DAY, JUDGE. *Affirmed.*

John M. Macfarland and A. J. Kinnersley, for appellant.

Brome & Brome, W. J. Connell and J. E. von Dorn, contra.

ROSE, J.

Between May 21, 1912, and June 4, 1912, Cordelia Peyton was a patient in plaintiff's hospital, and this is an action against her husband to recover a balance of \$85 for hospital services and medicines. The case was dismissed, and plaintiff has appealed.

The substance of the defense pleaded is: Though defendant was the husband of the patient, she was living apart from him. A suit on her behalf for a divorce and for alimony was pending. She had been awarded a temporary allowance of \$75 a month which he had paid regularly. He never obligated himself to pay his wife's indebtedness to the hospital. The defense thus outlined is fully established by the evidence and justifies the dismissal of the action. A husband who is living apart from his wife and is paying temporary alimony awarded to her by the court in a suit for divorce is not liable to a third person for necessities furnished to her, the former being

chargeable with knowledge of those facts, and the adequacy of the temporary alimony not being subject to question by a stranger. *Hare v. Gibson*, 32 Ohio St. 33.

The judgment is right and is

AFFIRMED.

FAWCETT, J., not sitting.

BERNARD MORFELD, APPELLEE, v. A. M. WEIDNER,
APPELLANT.

FILED NOVEMBER 13, 1915. No. 18309.

1. **Appeal: RULINGS: HARMLESS ERROR.** "To warrant the reversal of a judgment it must affirmatively appear from the record that the ruling with respect to which error is alleged was prejudicial to the rights of the party complaining." *Cronin v. Cronin*, 94 Neb. 353.
2. **Trial: INSTRUCTIONS: DECLARATIONS.** Instruction No. 3, requested by defendant and refused by the court, set out in the opinion, and held properly refused.
3. **Appeal: VERDICT: SETTING ASIDE: PREJUDICE.** To warrant the setting aside of a verdict on appeal, on the ground of passion and prejudice on the part of the jury, the record must affirmatively show that the verdict probably resulted therefrom.
4. **Assault and Battery: PERMANENT INJURY: SUBMISSION TO JURY: EVIDENCE.** In order to warrant the submission of the question of permanent impairment of the sexual powers to the jury, it is not necessary that there should be direct evidence that there will be such permanent impairment. Even though no witness testifies in express terms to such permanent impairment, yet, if physicians who treated plaintiff at the time and immediately after he received his injury and who examined him at the time of the trial, testify that the sexual organs are still abnormal, that there still exists malformation or hardening of the parts, and all the other evidence and circumstances in evidence are such as to warrant reasonable minds to conclude that the injury will result in permanent impairment of the sexual powers, the submission of such question to the jury is not in conflict with the rule that requires evidence which shows that there is a reasonable certainty that such permanent impairment will result.

5. **Damages: PERSONAL INJURY: PLEADING AND PROOF.** In an action to recover for injuries caused by an assault, evidence of the loss of sexual powers, resulting directly and proximately from the nature of the injury, may be received and considered by the jury, although the petition does not specify such loss as one of the results of such assault.

APPEAL from the district court for Platte county:
GEORGE H. THOMAS, JUDGE. *Affirmed.*

William V. Allen and William L. Downing, for appellant.

A. M. Post and C. N. McElfresh, contra.

FAWCETT, J.

From a judgment of the district court for Platte county, awarding plaintiff damages in the sum of \$3,000, for assault, defendant appeals.

The evidence shows that plaintiff had been working for defendant as a farm hand. Early in the morning of the day of the assault, plaintiff notified defendant that he was going to "quit." After breakfast plaintiff attended church, and later in the forenoon he and two companions drove in a buggy to defendant's farm. The purpose of the visit was to obtain settlement of plaintiff's account for wages. On arrival they found defendant in the field cultivating corn. A disagreement arose over the sum of \$2. Plaintiff insisted that he must have the \$2, and defendant told him he would not get it. Thereupon plaintiff called defendant a vile name. After being told not to do so, plaintiff repeated the offense, whereupon defendant rushed at him and administered a severe kick in his private parts. While it is not certain that defendant intended to kick him in that part of his person, it is fairly deducible from the evidence that at least the heel of his shoe, as he kicked upward, reached such part. Plaintiff then seized a whip and defendant a wrench. Each assumed a threatening attitude, but actual hostilities proceeded no further. After each had dropped his weapon, defendant drew a check for the amount due, less the \$2 in dispute, and gave

it to plaintiff. Plaintiff then got into the buggy with his two companions and they drove away. The above is the substance of the testimony of the plaintiff and defendant and the two other young men present, as the jury must have found the facts to be. At the time he received the kick, plaintiff made no outcry and did not say that he had been kicked in the parts above indicated. On the trial, the young man who was driving the buggy was permitted to testify in behalf of plaintiff that on leaving the farm, and right after the altercation took place, plaintiff said that defendant had "kicked him here," indicating the parts above mentioned.

By defendant's second assignment of error it is urged that this was an attempt to introduce a self-serving declaration which was no part of the *res gestæ*. We do not deem it necessary to decide whether or not the statement was so intimately connected with the assault as to make it a part of the *res gestæ*, for the reason that, even if it were too remote, it could not have prejudiced the defendant. Defendant's own testimony is that he kicked at him. The young man standing nearby testified that he saw him administer the kick, but wavered somewhat as to where the blow landed, stating at one time that the foot struck plaintiff in the breast too high up for even the heel to reach the parts indicated, and in another place admitting that the blow might have been low enough for the heel to have done so. Plaintiff testified that the kick was upon the part of his person indicated. This testimony, supported as it is by the uncontradicted evidence as to plaintiff's condition for weeks and months thereafter, is of such a character that, if the testimony of the driver of the buggy had not been admitted, the jury could not have found otherwise than that the plaintiff's injury resulted from the kick administered by defendant.

About seven or eight days after plaintiff's injury, his mother arrived at Humphrey, where plaintiff was being treated by Doctor Lemar. She was interrogated at some length as to the condition in which she found plaintiff,

and was permitted to state what he said as to his pain and suffering and about the parts which were causing the same. No objection was interposed to that line of questioning, but she also testified to some statements made by her to a man who was taking care of Doctor Lemar's office, to the effect that she intended to take plaintiff away. We have examined this part of Mrs. Morfeld's testimony very carefully, and find nothing in the statements made by her to Doctor Lemar, or by the doctor to her, which could have affected the result.

Defendant's third assignment of error is that the court erred in refusing to give his requested instruction No. 3, as follows: "You are instructed that while the court has admitted certain statements and declarations made by the plaintiff to other persons some time after the injury is claimed by the plaintiff to have been received, as to the manner in which his alleged injury was received, you should consider such statements and declarations with caution, and should subject them to a close scrutiny before giving them weight in your deliberations." This instruction could not properly be applied to the testimony of Mrs. Morfeld, or to the statements and declarations made by plaintiff to her. The statements made to her were not as to who had administered the blow, but simply statements as to his then physical condition—statements made at a time when he was either in bed, or confined to the house, or incapacitated for doing any work—and, while the jury might have been told that they would have a right to take into consideration the circumstances under which such statements and allegations were made, we do not think the court would have been justified in telling them that they should consider such statements and declarations "with caution" and should "subject them to a close scrutiny" before "giving them weight" in their deliberations. If the evidence was proper, and we think it was, the court would not have been warranted in so discrediting it. As applied to the testimony of the witness Rupert, the young man who was driving the buggy, it

could not have prejudiced the jury, for the same reasons above given in considering assignment No. 2.

The fourth assignment is that the court erred in permitting Mrs. Morfeld to testify as to statements made by plaintiff at various times, about a year after the alleged injury, at which times he complained about his left side, and stated that standing on his feet while he was clerking had hurt him; that, if he wanted to stoop, it was all right, but as soon as he straightened up it hurt him. None of these statements related to the cause of the injury or to who made the assault. They related simply to plaintiff's then condition. Plaintiff had himself testified to this condition, and the testimony of his mother that he had, at the time designated, made statements to her in reference thereto was improper; but, when taken together with all of the other evidence in the case, we cannot say that it was probably prejudicial. We think it would be extending the rule too far to hold that its admission was error for which the judgment should be reversed.

By the fifth assignment it is urged that the verdict was the result of passion and prejudice on the part of the jury. After a careful reading of all the evidence in the case, we do not think this charge is well founded.

We will now consider the first assignment of error, which is really the important question in the case. This assignment assails instruction No. 7, given by the court on its own motion, and the refusal of the court to give instruction No. 1, requested by defendant. Instruction No. 7 is as follows: "If you find the injury to be permanent, then, in fixing the amount of damages, you should take into consideration the nature and extent of the injury in all its fair and reasonable consequences, including the impairment of his faculties of generation, if any you shall find, and include future as well as past and present disability, physical pain and suffering." The part of the instruction assailed is the clause, "including the impairment of his faculties of generation, if any you shall find." It is argued in the brief that "there was not a syllable of

testimony anywhere in the case to the effect that any of the plaintiff's sexual powers were diminished, as a result of the alleged assault." It is evidently upon that theory that counsel requested the giving of instruction No. 1, the refusal of which is complained of, and which is as follows: "You are instructed that there is no direct evidence in this case that the plaintiff has sustained any injury impairing his sexual powers or his powers of procreation, and, if you find for the plaintiff, you should not take into consideration any such injury in assessing the amount of the plaintiff's recovery." This instruction does not correctly state the rule. In order to warrant the submission of the question of impairment of his sexual powers to the jury, it was not necessary that there should be "direct evidence" that the plaintiff has sustained such an injury. Even though no witness has testified in express terms that a party seeking damages for an assault has sustained a permanent impairment of his sexual powers, yet if physicians, who treated plaintiff at the time and immediately after he received his injury, and who examined him at the time of the trial, testify that the sexual organs are still abnormal, that there still exists some malformation or hardening of the parts, and all of the other evidence, facts and circumstances in evidence are such as to warrant reasonable minds to conclude that the injury will result in impairment of those powers, the jury would be warranted in finding that there is a reasonable certainty that such permanent impairment *will* result. 13 Cyc. 217h, and cases cited in note 43, p. 218. After a very careful consideration of the evidence, we feel that this is that kind of a case, and that, if the jury in assessing the plaintiff's damages did consider that as one of the elements of damages in determining the amount of their verdict, they were justified by the evidence in so doing.

It is further argued: "There is still another reason why the jury should not have been instructed that they should include in the damages *'the impairment of his faculties of generation'*, and why the defendant's requested instruc-

tion should have been given. That is because those special damages were not averred in the plaintiff's petition." Authorities are cited to support this contention, but the rule in this court is otherwise. In *City of Harvard v. Stiles*, 54 Neb. 26, we held: "A recovery may be had under a general allegation of damages for all injuries which necessarily follow as results of the act, the subject of complaint. They need not be specially pleaded, and this is applicable to necessarily resulting permanent effects of the injuries." This is also the rule announced by the United States supreme court. In *Denver & R. G. R. v. Harris*, 122 U. S. 597, it is held: "In trespass on the case to recover for injuries caused by gunshot wounds inflicted by defendant's servants, evidence of the loss of power to have offspring, resulting directly and proximately from the nature of the wound, may be received and considered by the jury, although the declaration does not specify such loss as one of the results of the wound." It follows from what has been said that the court did not err in giving instruction No. 7, or in refusing to give instruction No. 1, requested by defendant.

The sixth and last assignment is the general one that the court erred in overruling defendant's motion for a new trial. Finding no error in the record of the trial, this assignment must also fail.

Upon a consideration of the whole case, we do not feel at liberty to disturb the judgment entered in the court below. It is therefore

AFFIRMED.

SEDGWICK and HAMER, JJ., not sitting.

EVA BELL HAIGHT, APPELLANT, v. OMAHA & COUNCIL
BLUFFS STREET RAILWAY COMPANY, APPELLEE.

FILED NOVEMBER 13, 1915. No. 17889.

1. **Jury:** DRAWING OF PANEL: PRESUMPTION. In counties of 30,000 or more inhabitants the regular panel of 30 jurors for each judge of the court must be drawn by lot from the regular jury list, and cannot be filled by the sheriff by calling bystanders. The regular jury list consists of not less than one-fifteenth of the legal voters of the county, and it will not be presumed, in the absence of evidence, that the list was exhausted in the ordinary work of the court.
2. ———: ———: **TALESMEN.** In case the jury list should be exhausted so that the panel could not be filled as the law requires, talesmen might be called, if "required in such court for trial of any cause" (Rev. St. 1913, sec. 8156), but the regular panel cannot in any case be filled in that manner. The third paragraph of the syllabus of our former opinion (97 Neb. 293) is disapproved.
3. ———: **IRREGULAR PANEL: NOTICE: PRESUMPTION.** The parties to an action are supposed to take notice of formalities in making jury lists which are required by statute and regularly shown upon the record, but not necessarily of orders made in the trial of other cases in which they are not interested, or that the regular jury panel had been exhausted in the trial of a prior case, and had then been unlawfully filled by calling bystanders.
4. ———: **DRAWING OF PANEL: PRESUMPTION.** If there is no order to call talesmen in the case in which counsel are interested, and the jurors are called by the clerk in the ordinary manner, they may rely upon the statute which requires that the jurors be called from the regular panel.
5. **New Trial: JURY: IRREGULAR PANEL.** It is erroneous to order that the regular trial panel be filled from bystanders. If the panel has been so formed, and a jury called therefrom for the trial of a cause, without the knowledge of the parties thereto until after the trial of the case that the panel has been so filled, and the objection is made in a motion for new trial regularly filed, such objection should be sustained and a new trial granted.

REHEARING of case reported in 97 Neb. 293. Former judgment of affirmance set aside, and judgment of district court reversed.

SEDGWICK, J.

Our former opinion is reported in 97 Neb. 293. The rehearing was allowed upon one proposition only—whether the court erred in not finding that the jury which tried the case was illegally constituted. The statute (Rev. St. 1913, sec. 8148 *et seq.*) provides that in counties having more than 30,000 inhabitants a list of names shall be made by the proper officers and placed in a box or wheel (sections 8148, 8153), and that from this list the clerk of the district court shall draw by lot 30 for each judge of the district court, who shall constitute the regular panel (section 8154). It also provides that, if the regular panel of 30 so constituted is exhausted, the judge of the district court shall order the clerk to fill the panel by drawing more names from the wheel or box. The parties so drawn are to be notified by registered letter. This, of course, takes some time. If, before they appear, a case is called and the panel is not sufficient, then the court may order the sheriff to call bystanders or men from the body of the county to act in that case. Some time before this case was tried in the district court, one of the judges was trying a criminal case, and he made an order reciting that the panel was exhausted and ordering the sheriff to call men from the body of the county to fill the panel in that (criminal) case, and then added these words: "Or such other cases as might be assigned for trial during the remainder of the third three weeks of the October, 1910, term." It seems that when the sheriff called these men they were treated by the clerk as a regular panel, and when the plaintiff's case came on for trial they were called as of the regular panel and sat upon the trial of the plaintiff's case. The plaintiff contends that the sheriff could not call men from the body of the county, except for the trial of the particular case in which he was ordered to do so, and that this plaintiff did not know that the regular panel had been filled by the sheriff from the body of the county, or that the regular panel had been exhausted, and

so was not bound to make objection before the trial of her case. It seems clear that under the statute the court had no jurisdiction to order the sheriff to fill the regular panel for other cases that might be assigned by calling men from the body of the county.

In Thompson & Merriam, *Juries*, sec. 102, published more than 30 years ago, it is said: "The frequent necessity of summoning talesman has had the effect of breeding in every community a disreputable class of loiterers about courtrooms, having no other purpose than to be selected for jury service. So conspicuous has this evil become of late years, that these persons have been dubbed with the distinctive title of 'professional jurors.'" The same evil continues, and it not infrequently happens that, when a case of public interest is about to be tried, many friends of the parties gather at the place of trial, and the sheriff, if conscientiously trying to perform his duty, is at a loss to know who of the bystanders might unduly favor the interests of either party. The same authors said: "'All questions touching the formation of juries,' said Mr. Justice Coleridge upon an important occasion, 'must be examined by the judges with very critical eyes.' This expression is a fair illustration of that solicitude for the right of the subject to an impartial jury, which has characterized the English law from the earliest period of its history." Section 125.

If the sheriff, in filling the panel for the trial of the prior criminal case, succeeded in avoiding all who might be interested for or against the defendant in that case, he still might have called the very men who should not be called for this subsequent case. To guard against errors of this nature, the statute provides for the larger cities a specific method of filling the panel not required in the less populous counties. The general statute for smaller counties (Rev. St. 1913, sec. 8143) does not apply. That section of the general act was in the Revised Statutes of 1866, p. 511, and in 1905 (Laws 1905, ch. 177) the statute providing specially for the more populous counties was en-

acted. Rev. St. 1913, sec. 8148 *et seq.* That statute (section 8156) provides that to fill the panel, when necessary, "the clerk of such court shall, when ordered by the judge, again repair to the office of the county clerk, and draw in the same manner as at the first drawing, such number of jurors as the judge shall direct, to fill such panel." The same section provides: "In case a jury shall be required in such court for trial of any cause, before the panel shall be filled in the manner herein provided, the court may direct the sheriff to summon from the bystanders, or from the body of the county, a sufficient number of persons having the qualifications of jurors, as provided in this article, to fill the panel, in order that a jury to try such cause may be drawn therefrom, and when such jury is drawn, the persons selected from the bystanders, or from the body of the county, to fill the panel, and not chosen on the jury, shall be discharged from the panel, and those who shall be chosen to serve on such jury shall also be discharged from the panel at the conclusion of the trial." This is a positive declaration that in these populous counties jurors called as talesmen for the trial of any case shall not be placed upon the regular panel, but must, when not wanted for, or when they have served in, the case for which the sheriff has called them, be discharged, and, to leave no doubt of the intention of the legislature, the section closes with the following proviso: "*Provided*, persons selected from the bystanders, as provided in this section, shall not thereby be disqualified or exempt from service as jurors, when regularly drawn by the clerk for that purpose in the manner provided in this article." The regular panel could only be filled by drawing names by lot from the lists prepared and in the wheel or box. The proceeding was erroneous, and the question is whether the plaintiff is estopped to make the objection now because she did not make it before the trial. Was the plaintiff bound to know that the regular panel was exhausted and that the court had filled it in an unlawful way? If she was, she is now estopped to complain, but if she was

not bound to know that, and made her objection in the district court, as it seems she did, upon the motion for new trial filed in due time, then the motion should have been sustained, and the judgment is erroneous.

Ordinarily a challenge to the array, to be available, must be made before the trial. A party cannot voluntarily take his chances with one jury, and then obtain another trial on the ground that the jury was irregularly called or some of its members disqualified. The parties are supposed to take notice of formalities prescribed by statute and regularly shown upon the records. But the parties to this case are not presumed to have been in court at the trial of the prior criminal case. They did not necessarily have notice that the panel of 30 jurors for the criminal court had been exhausted, or that the judge of that court had directed that bystanders called by the sheriff in the former trial should constitute the panel from which jurors should be called to sit in their case. The statute provided that the panel from which the jurors were to be called should be filled from the regular jury list, which must ordinarily contain the names of 500 or more qualified jurors and they could rely upon compliance with the statute in that regard. The presumption was that the regular jury list from the county at large prepared by the proper officers, before the term, and without reference to any particular case, would be unprejudiced and disinterested. The plaintiff might not regard it entirely safe to rely upon a similar presumption as to jurors called from the environment of the courtroom. The proceeding in this case was not only dangerous to the plaintiff's interests, but was in direct violation of the statute, and could not have been anticipated or guarded against.

Our former judgment is set aside, and the judgment of the district court is reversed and the cause remanded.

REVERSED.

LETTON, J., dissenting.

In the former opinion in this case (97 Neb. 293) three points were decided: (1) That there was sufficient evidence to support the verdict; (2) that it was not affirmatively shown that certain talesmen were improperly drawn; (3) that a party to a suit cannot wait until after the jury has returned an adverse verdict before raising objections to the qualifications of jurors.

The majority opinion does not consider nor controvert the first point, and, hence, we have the anomalous situation that, although a proper verdict has been rendered, it is set aside on account of a mere irregularity in filling the panel. As to the second point, upon further consideration, I am inclined to think that the law laid down in the third paragraph of the syllabus in the former opinion did not construe the statute properly, and that the present opinion makes the proper interpretation. This should not affect the judgment, because, as pointed out, the rule is that one will not be permitted to wait until after an adverse verdict before he questions the qualifications of a juror. If he does this, he waives his right to object. The majority opinion holding that this can be done overrules a number of former decisions of this court without mentioning them, and is contrary to the general rule in other states.

In 1 Thompson, Trials (2d ed.) sec. 116, Mr. Thompson says that the mass of American authorities is in conformity with this rule: "It has been repeatedly held that a cause of challenge not discovered until after verdict, whether the case be civil or criminal, as that some of the jurors were aliens, or *not* of the jury list as *selected* by the county authorities, * * * is not, *per se*, a ground of new trial, though it may be such in the discretion of the court. In the exercise of such a discretion, an essential inquiry will be whether the objecting party exercised reasonable diligence in ascertaining the qualifications of the obnoxious juror. Was he questioned on the *voir dire* as to the cause of challenge now alleged? If not, there has been

a lack of diligence on the part of the complaining party, which amounts to a waiver of the cause of challenge. * * * In England and in many American jurisdictions a paramount inquiry upon such an objection is whether it has resulted in an unjust verdict; if not, the objecting party has sustained no injury, and a new trial will not be granted in order that public and private time may be consumed, and the dangers of other irregularities incurred, when the same result must, on a just view of the evidence, be reached. Unless there is plain evidence of injustice done to the party complaining, the verdict should be allowed to stand."

This has heretofore been the settled rule in this state, even in criminal cases. In *Wilcox v. Saunders*, 4 Neb. 569, it was held that the objection that a juror was disqualified by reason of not being a resident of the county for the statutory period was waived because not made before the trial, and that, if the disqualification was not known at that time, the record should show that an effort to ascertain the facts was made upon the *voir dire* examination; otherwise a new trial would not be granted.

In *Brown v. State*, 9 Neb. 157 (a criminal case), it was held that, as the law then stood, a district judge, in calling a special term of court, had no authority to order the sheriff to summon grand and petit juries, but it was also held that objection to the mode of selecting the jury must be made by challenge or plea in abatement, and that after the accused had pleaded to the indictment it was too late to object that the jury were not legally summoned.

In *Davis v. State*, 31 Neb. 247, 254, the county commissioners selected only 59 names, instead of 60, as jurors. The opinion says: "The statute requires that the commissioners shall select 60 names. It has been frequently declared by this court that the provisions of the statute relating to the selection of grand and petit jurors are mandatory and must be strictly followed. *Burley v. State*, 1 Neb. 385; *Preuit v. People*, 5 Neb. 377; *Brown v. State*, 9 Neb. 157; *Clark v. Saline County*, 9 Neb. 516; *Barton*

v. State, 12 Neb. 260. No objection was made in the court below that the list from which the jurors were drawn did not contain the requisite number of names. The sole objection there made related to the inequality of the selection, and that was raised for the first time in the motion in arrest of judgment. This was too late. It should have been taken before the trial, by motion to quash the panel. The defendant waived all errors in the manner of selecting the jury."

Turley v. State, 74 Neb. 471, was a prosecution for murder. One who was disqualified by reason of having been convicted of a felony sat as a juror. In the opinion by Sedgwick, J., it is said: "Great latitude is allowed the defendant upon the *voir dire* examination to enable him to ascertain whether there is any ground for objecting to the juror. He cannot waive an objection of this nature, and, after taking his chances of an acquittal before the jury selected, insist upon an objection which he should have raised upon the impaneling of the jury, and, if he makes no effort to ascertain whether a juror offered is qualified to sit, he must be held to have waived the objection. Any other rule would introduce uncertainty into a jury trial which would be intolerable." This is followed in *Reed v. State*, 75 Neb. 509.

In the case at bar no objection was made at any stage of the trial. The list of names on the panel of regular jurors was of record and within the reach of plaintiff and his counsel before the trial. A reference to this list, which under the statute could not at any time include more than 24 jurors for each judge sitting with a jury, would at once have disclosed that the jurors complained of were not regularly upon the panel. Having failed to interpose any objection or complaint until after he had tested the temper of the jury and received an adverse verdict, the plaintiff waived the irregularity, and is bound by the verdict.

BARNES and FAWCETT, JJ., concur in this dissent.

LEWIS C. OVERTON ET AL., APPELLEES, v. CHARLES W. SACK
ET AL., APPELLANTS.

FILED DECEMBER 3, 1915. No. 18317.

1. **Deeds:** CANCELTION: FRAUD. Before a court of equity will set aside a deed obtained by fraud, or imposition, practiced upon a person of weak mentality, it will require a return of the purchase money paid, or, if that cannot be done, will make such other order as will place the purchaser in substantially the same condition as he was in at the time the deed was made.
2. **Limitation of Actions:** BEQUEST. A specific money bequest, resting as a lien upon real estate in the hands of a residuary devisee, is barred after the lapse of ten years from the time the right of action thereon accrued.

APPEAL from the district court for Sarpy county: HARVEY D. TRAVIS, JUDGE. *Modified and remanded, with directions.*

Stout, Rose & Wells and Matthew Gering, for appellants.

William R. Patrick and Anthony E. Langdon, contra.

MORRISSEY, C. J.

June 16, 1885, William Overton died, testate, seised of certain lands in Sarpy county. He devised to the widow the land herein in controversy, during her natural lifetime, and provided that at her death it should descend to his son, William B. Overton, subject, however, to the payment of \$200 each to his sons, John G. Overton, Lewis C. Overton, North L. Overton, and to his daughter, Martha C. Sack. The will was duly filed and admitted to probate in 1885, and in December, 1887, the accounts of the executor were approved and he was duly discharged by the county court. The widow, Catherine Overton, died May 11, 1901. July 15, 1907, Lewis C. Overton filed a petition in the probate court alleging the nonpayment of the legacies, and procured the appointment of an administrator with will annexed. September 3, 1910, the administrator filed his re-

port showing that no property had come into his hands and praying for his discharge. On the day set for hearing the court entered a decree finding it the duty of the administrator to collect the bequests, and that on such collection and payment an order of discharge would issue. This appears to end that proceeding.

From the death of William Overton in 1885 until the death of his widow, Catherine Overton, May 11, 1901, the widow and her son William B. Overton occupied the premises, and from the death of the widow until August 11, 1911, they were occupied by William B. Overton. On the last named date William B. Overton executed a deed of conveyance of the real estate to defendant Edgar R. Kobler, and, on the same day, Kobler executed a deed to the defendant Sack. Soon thereafter William B. Overton died intestate. This action was brought primarily for the cancellation of these deeds.

The plaintiff Lewis C. Overton is a son of William, and a brother of William B. Overton, and the other plaintiffs are also heirs of the deceased William and William B. By their petition, plaintiffs allege that shortly after the death of Catherine Overton they entered into a mutual agreement with William B. Overton that, in consideration of their forbearance to prosecute the collection of the legacies due them under the will of William Overton, William B. Overton should not alienate or incumber the real estate, and should die intestate, to the end that his property should descend to the legatees, or to those entitled to the property by right of representation, they being the sole heirs at law of the said William B. Overton; that, relying upon this agreement, the legatees forbore the prosecution or collection of the several amounts due under the will; that August 11, 1911, the defendants Edgar R. Kobler and Charles W. Sack, conspiring together for the purpose of unlawfully securing the property of William B. Overton, by the exercise of deception, fraud and undue influence, procured the execution of the deed from William B.

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Overton to Edgar R. Kobler; that at the time Overton was mentally incompetent to execute and deliver a deed, and also that Sack and Kobler well knew of the oral agreement whereby he had agreed to die intestate without incumbering or alienating the real estate; "that, under the impotunity, advice and direction of the defendant Kobler, said William B. Overton, having in his possession the sum of about \$5,000, was, in the nighttime, taken by said Kobler and conveyed to a lonely spot in Douglas county, Nebraska, where the said William B. Overton was, during said night, murdered and robbed of said money, which was thereby lost to the plaintiffs and other heirs at law of said William B. Overton." It is also alleged that the consideration, \$4,000, was grossly inadequate, and that the land was of the value of \$5,000. There was a prayer that the alleged oral agreement be enforced and held valid; that the deeds be declared null and void; that the title to the land be quieted and confirmed in the plaintiffs to the extent of their interest as heirs of William B. Overton, or, in the event that the court did not so decree, that the plaintiffs be held to have a lien upon the premises for the amount of the bequests contained in the will of William Overton, together with interest thereon from the date of the death of Catherine Overton, May 11, 1901. Minor heirs, through their guardian *ad litem*, intervened, and by cross-petition set out all the matters contained in plaintiff's petition, and in addition prayed for a construction of the will of William Overton.

Defendant Charles W. Sack, by answer, denied all allegations of fraud and duress; admitted the purchase of the land, and the chain of title by which he held; and alleged that through Edgar R. Kobler, his agent, he purchased the same for \$4,000, its full merchantable value; denied that he had any knowledge, part or participation in any artifice, trick or fraud employed by Kobler; denied that he had any knowledge or information that William B. Overton was incompetent to transact business; alleged that in making the purchase he acted in good faith; denied

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that the murder and robbery were incident to or connected with the real estate transaction, or that they were in any way attributable to him; denied that either William B. Overton, during his lifetime, or any of his heirs or representatives, ever tendered or offered to return the \$4,000 which he paid for the land; alleged that the estate of William Overton was fully administered and the executor discharged December 6, 1887; that more than ten years elapsed between the date of the decease of Catherine Overton, May 11, 1901, and the commencement of this suit, October 24, 1911, and that the legacies mentioned were barred by the statute of limitations. The defendant Edgar R. Kobler, filed a general denial.

The findings of the trial court, so far as material here, are: That the legacies mentioned in the will of William Overton were never paid; that in making the purchase the defendant Kobler acted as the agent of the defendant Charles W. Sack; that William B. Overton "was an old man, weak in body and mind, living the life of a recluse, and that said fact was well known to the defendants Kobler and Sack;" that by representing to Overton that he was about to be arrested on the charge of arson he was put in great fear, and while in a highly agitated state of mind and wholly disqualified to act rationally as to his property, and "probably insane," he made the deed, and that Sack was fully cognizant of these facts, and that these representations were false; that following the execution of the deed, and on the same day, the defendant Kobler conveyed Overton, who then had at least \$5,000 on his person, to a lonely spot in Douglas county, "where said William B. Overton by some person or persons, was murdered and robbed of his money." The court makes the further finding that on August 11, 1911, defendant Kobler possessed himself of all the money of William B. Overton except \$35; that the value of the land was \$5,000; that the evidence did not sustain plaintiff's claim of an oral agreement on the part of William B. Overton to die intestate. He decreed that the deeds be set aside as fraudulent; that the legacies men-

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tioned in the will of William Overton be established as liens upon the real estate, and the land to be sold to satisfy the same, and, after the payment of the legacies, the proceeds be divided among the heirs; that the defendant Martha C. Sack pay into court \$200 which the defendant Kobler had given her immediately following the disappearance of William B. Overton; that Kobler pay into court \$4,800, \$4,000 of which to be paid to Charles W. Sack, and the remainder to be divided among the heirs of William B. Overton.

Overton was an eccentric character, who had spent nearly all his life on this little farm. After the death of his mother, which occurred in 1901, he had lived alone in a small cabin, and, though surrounded by relatives, he seldom visited them, and they rarely called on him. The land lay adjoining the farm owned by the defendant Sack, who was a relative but did not enjoy his favor. The defendant Kobler, a young man, who was also related to Overton, and on friendly terms with him, discovered that the farm might be purchased. He went to Sack and told him it could be bought for \$3,000. Sack at once agreed to take the property and to pay Kobler \$300 commission for making the purchase. Kobler returned to Overton only to find that he had raised the price to \$4,000. Finally a contract was closed at the larger figure, but some modification was made between Sack and Kobler as to the amount of Kobler's commission. Sack went to his local banker, and, by executing a mortgage on the farm which he then owned, arranged with the banker to pay Overton the purchase price. Kobler and Overton went to the bank, Overton executed a deed of the property to Kobler, believing that Kobler was the real purchaser, and immediately thereafter Kobler deeded to Sack. The banker suggested to Overton that he take bank paper, but on Overton's insistence that he would accept nothing but cash the money was paid over. Overton then went to the home of a cousin in Springfield. He put the currency in a small sack, which he wore around his neck, and the gold and silver

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into a tin bucket; he having about \$5,000 all told. About 6 o'clock that evening, without waiting for supper, he left the home of this cousin, in company with Kobler, taking with him all of his earthly belongings. It is insisted by plaintiffs, and we think fairly shown by the evidence, that Overton had been led to believe that the sheriff was about to arrest him on a charge of burning some hay stacks, and that it was necessary for him to depart at once in order to avoid arrest. They drove to the town of Millard, where they were last seen together. About thirty days later the body of William B. Overton was found, and all of his money was gone, except \$35, which was overlooked by the party who murdered and robbed him. The circumstances point strongly to Kobler as the perpetrator of this heinous crime.

Immediately following the execution of the deeds and the payment of the money, Sack met the plaintiffs in the town of Springfield, and told them of the transaction. It is insisted by the plaintiffs that he misled them as to Overton's whereabouts, but it is not contended that they made any objection to the sale or any claim to an interest in the property. Overton went freely about the streets of the little town during the afternoon, and the money was paid over by the banker in the regular course of business.

Having reached the conclusion that at the time Overton executed the deed he was of weak mentality and that the deed was obtained by fraud or imposition, practiced upon him by Kobler, it is unnecessary to discuss the testimony on which the trial court based its finding. But it is not claimed that Sack had any part in the murder or robbery of Overton, and the decree of the trial court directing Kobler to pay \$4,000 into court for the benefit of Sack, the amount he had paid for the land, is as conclusive as though he had made a special finding to that effect, that the trial judge believed that Sack was in no way connected with the felonies.

Sack not being in any way connected with what occurred after the execution of the deeds and the payment of the

money, will a court of equity grant plaintiffs the relief prayed without a return, or an offer to return, the money paid? In reply to this question, appellees say, "Sack having availed himself of the real estate, which he received from Kobler, he is likewise charged with all the instrumentalities employed by Kobler to effect and secure the conveyance of the land to him by Overton," and cite, though under incorrect title, *McKeighan v. Hopkins*, 19 Neb. 33, and *Osborn Co. v. Jordan*, 52 Neb. 465. These cases merely lay down the familiar rule that a principal may not ratify the unauthorized act of his agent in so far as it operates to his advantage and repudiate those acts in so far as they impose burdens. Sack is not accused of entering into a conspiracy with Kobler for the commission of a felony. If Kobler be guilty of these crimes, they were perpetrated after his agency had ceased; they were beyond the scope of his employment, and Sack cannot be held accountable therefor in any degree. At the time Sack employed Kobler to negotiate the purchase, negotiated the loan with the bank, arranged for the banker to draw the deed and make the settlement with Overton, he surely had no reason to suppose that Overton would take this money in cash and go out unarmed in the night season, thus leaving himself subject to the assault that was made upon him. He could not reasonably contemplate that Kobler or anybody else would rob and murder him, and, in the absence of any proof that he might have contemplated these things, we must adhere to the rule requiring restoration of the *status quo* as a condition of decreeing the cancelation of the deeds. The appellees contend that Kobler robbed Overton of his money, and thereby made it impossible for plaintiffs to tender a return of the purchase price, and that Sack must look to Kobler and the warranties in his deed for reimbursement, and that Sack deceived plaintiffs as to the whereabouts of Overton and deprived them of the opportunity to quiet his fears and protect either him or his money, citing *Meyer v. Fishburn*, 65 Neb. 626. In that case the court held to the general rule that a party who seeks

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to rescind a contract entered into fraudulently or induced by undue influence must return, or offer to return, the property acquired by such contract within a reasonable time, and so place the adverse party *in statu quo*, but held that there is an exception to that part of the rule requiring a return of the property where the party guilty of fraud and undue influence, and as a part of the general wrongful design, has by advice or interference induced the other party to part with his property, and held that in such case a tender of the value of the property received is sufficient, and decreed the defendant a lien upon the premises for an amount equivalent to the value of the property transferred. In the instant case Sack neither counseled nor advised Overton to take the money and lay himself open to robbery and murder, but, on the contrary, he arranged to have it paid by the banker in his bank, where he might reasonably suppose Overton would leave it until drawn out in the regular course of business, and it cannot be said that the robbery was any part of the design or scheme contemplated in the purchase of the real estate.

We are convinced that the court was warranted in finding that the oral agreement pleaded was not proved, but was in error in establishing the legacies left under the will of William Overton as liens upon the real estate. William Overton died in 1885, and his executor was discharged in 1887. Twenty years elapsed thereafter before any steps were taken looking to the collection of the legacies. Even at that late date these measures consisted only in the application to the county court for the appointment of an administrator with the will annexed, which appointment was made. And some three years later this administrator filed a petition asking for a final settlement of his account. Notice was published, and the county court entered a decree finding that the only duty devolving upon the administrator was the collection of the bequests, and that they were a charge upon the real estate, and that upon the collection thereof the administrator would be discharged. No further steps were ever taken.

The guardian *ad litem* has asked that the payment of these legacies be decreed to be a condition precedent to the vesting of the title in William B. Overton, but a reading of the will itself at once demonstrates that they never were anything but liens upon the real estate, and the only question to be determined in relation to the legacies is whether the statute of limitations has run against them. In *Klug v. Seegabarth*, 98 Neb. 272, this court held: "An action to enforce the lien of a specific money bequest upon real estate in the hands of the residuary legatee is not barred until ten years from the time payment becomes due." Taking the view most favorable to the contention of appellees, namely, that the bequests became due and payable upon the death of the widow, still more than ten years had elapsed before this suit was brought, or before the deeds were executed, and the legacies were barred by the statute of limitations.

So much of the decree as directs Martha C. Sack to pay \$200 into court is entirely beyond the issues and is set aside. Kobler has not appealed from the judgment directing him to pay \$4,800 into court, and therefore as to him the judgment will be affirmed, but modified, however, by striking out that clause directing the payment of \$4,000 thereof to Charles W. Sack, and the whole amount, if collected, shall be credited to the estate of William B. Overton, deceased.

Having reached the conclusion that the deeds ought to be canceled and set aside, but that Sack is entitled to a return of his money, the cause as to him is reversed and remanded, with directions to the court to enter a decree setting aside the deeds, and to make an accounting of the value of any permanent improvements Sack may have made on the premises, and credit him with this amount, together with the original purchase price, with interest thereon at the rate of 7 per cent. per annum from date of payment, and from the amount so found deduct the value of the rents and profits of the real estate while in his possession, and establishing the amount so found to be

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due as a first lien on the real estate. If the legal representatives of William B. Overton, deceased, fail to pay into court the amount so found, within 20 days from the entry of the decree, the real estate shall be sold for the payment and satisfaction thereof, the surplus, if any, to be paid to the legal representatives of William B. Overton, deceased.

MODIFIED AND REMANDED, WITH DIRECTIONS.

SEDGWICK, J., concurring.

I think that the judgment is rightly reversed, but I do not think it should be left entirely at the option of the plaintiffs to cause a sale of the property.

ROSE and HAMER, JJ., not sitting.

UNION PACIFIC RAILROAD COMPANY, APPELLEE, v. M. N.
TROUPE, COUNTY TREASURER, ET AL, APPELLANTS.

FILED DECEMBER 3, 1915. No. 19086.

1. **Schools and School Districts: TAXES: AMOUNT OF LEVY.** When a school district has money in its treasury available for the support of the school during the ensuing school year, it is bound to take that fact into account in fixing the tax levy, and the levy should be made for no more than will approximately raise the difference between the amount on hand and the amount determined as necessary to meet the expenses of the district for the ensuing school year.
2. ———: **BUILDING FUND: TAX LEVY: VALIDITY.** Where a school district undertakes to vote a tax for the purpose of creating a building fund without complying with the provisions of section 11543, Ann. St. 1911, (Rev. St. 1913, sec. 6743) any assessment or levy made thereunder is void.
3. **Taxation: INJUNCTION.** Injunction will lie to restrain the collection of a tax levied or assessed for an unauthorized or illegal purpose.

APPEAL from the district court for Buffalo county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

H. M. Sinclair and E. B. McDermott, for appellants.

Edson Rich, B. W. Scandrett and T. F. Hamer, contra.

MORRISSEY, C. J.

Action by plaintiff to restrain the collection of taxes levied for school purposes under sections 11540, and 11543, Ann St. 1911. Twenty causes of action against as many school districts are set out in the petition. Nineteen of these causes of action involve the same question, the only difference being that they relate to separate and distinct school districts, and there is a difference in amount. The parties have seen fit to select district No. 3, being the second cause of action, as typical of the 19. The case of this district turns upon the construction of section 11540, Ann. St. 1911.

Plaintiff's line of railroad extends throughout the district, and its assessed valuation therein is approximately 50 per cent. of the total assessed valuation of the district. There is no substantial dispute as to the facts. Prior to the annual school district meeting held June 30, 1913, the district trustees estimated that the expense of maintaining the school during the ensuing year would be \$800, and at the annual district meeting it was determined by the voters of the district, that \$800 would be required for the maintenance of the school during the school year, and the district officers sent up their certificate to the proper county officers showing that the school district had voted \$800 as the estimated expense of maintaining the school for the next school year, and requesting that a levy be made sufficient to raise that amount. The county board caused a levy of 8 1-2 mills on the dollar valuation to be made. Applied to the assessed valuation of the property of the district, this would produce \$959, and it made a charge against plaintiff's property of \$501. At the time the school district had on hand \$703.82. Thus it will be seen

that it lacked only \$96.18 of having as much money on hand as the total estimated expenses for the year. Plaintiff alleged that a levy of one mill on the assessed valuation of the district would raise an amount which, added to the money on hand, would exceed the amount necessary to maintain the school for the year, and on this basis tendered to the defendant county treasurer its proportion of the tax, and brought this suit to have the remainder of the tax declared null and void, and to restrain the defendant county treasurer from attempting to collect the same.

The section under consideration reads as follows: Section 11540: "That trustees of each school district within the State of Nebraska shall, prior to the annual school district meeting in each year, provided for by section 5427 of this act (11530), prepare an estimate showing the amount of money required for the maintenance of schools during the coming school year, and the legal voters at the annual school meeting each year, shall determine the amount of money required for school maintenance during the coming school year, which shall be an amount sufficient to maintain a school in the manner and for the time provided in section 5440 (11545) of the act and the amount of money so required shall be levied as a tax upon all of the taxable property of the school district; provided, that in districts having four children or less of school age, the amount levied shall not exceed the sum of four hundred (\$400) dollars in any year; and in districts having more than four and less than sixteen children of school age, the levy shall not exceed the sum of fifty (\$50) dollars per child in addition to the above. The amount of money so voted as being necessary for the maintenance of the school for the coming year, shall be certified by the district school board to the county clerk of the county in which said school district is located and said amount shall be levied by the county board on the assessed value of the school district, and be collected as other taxes; provided, that the amount so levied shall not exceed in any one year

two and one-half (\$2.50) dollars on the one hundred dollar valuation as assessed and equalized."

Under this section it was the duty of the school district officers to prepare an estimate showing the amount of money required for the maintenance of the school, and the legal voters were left to determine at the annual school meeting the amount required for school maintenance during the succeeding year, with a provision that the amount so voted should not exceed "in any one year two and one-half (\$2.50) dollars on the one hundred dollar valuation as assessed and equalized." The amount voted and levied is within the 25-mill limitation. But plaintiff contends that, after the school district has determined the amount necessary to meet the expenses for the ensuing year, it must then take into account the amount of money on hand, and that the levy shall be no more than is sufficient to raise the difference between the amount on hand and the amount fixed and determined as the sum necessary to meet the expenses for the ensuing year. So far as this cause of action and those similar to it are concerned, this is the question to determine.

The other complaint is directed against an assessment and levy made by district No. 22 for the purpose of creating a building fund. It is pointed out that the only authority for voting this tax was derived from section 11543, Ann. St. 1911, which, so far as material here, provides that the voters at the annual school district meeting may determine upon a levy not to exceed ten mills on the dollar valuation, which shall be expended for building purposes, upon petition filed with the district trustees at least twenty days before the annual meeting, of one-fourth of the legal voters of the district, praying that the question of voting a tax for that purpose be submitted at the annual meeting, and making it the duty of the trustees to include such question in the posted notices calling such meeting, requiring that the petition shall definitely state the whole question to be submitted, including the sum desired to be raised or the amount of the tax to be levied, and the whole regulation, in-

cluding the time of its taking effect or having operation. It further provides that, if a majority of the electors vote in favor thereof, that fact "shall be certified to the county board, which, upon being satisfied that all the requirements have been substantially complied with, * * * shall make an order that the levy be made." The preliminary steps for making this levy were not taken, and for these reasons, the plaintiff alleges that the assessment was null and void. The court found that the taxes complained of in the several causes of action were levied without authority of law, and were therefore null and void, and entered a decree as prayed, restraining their collection.

After a school district has determined the amount necessary to meet its expenses for the ensuing year, must it take into account the money it has on hand and adjust its levy so as to raise an amount which, added to the sum on hand, will meet the expenses of the district, or is it free to disregard the money already in the treasury and make a levy which will raise an amount equal to the estimated expense for the year, provided this levy is within the 25-mill maximum fixed by the statute? It has never been the policy of the law to create a fund by taxation to lay by for future use, except only in the case of building funds, sinking funds to meet outstanding bonds, etc., and in these cases express authority is given by statute. Even these statutes provide for certain formalities and special notice, so that the voters of the district may have their attention directed specifically to the proposed levy. The section quoted (11540) shows that the estimate shall be made annually. It also provides that the voters at the annual meeting shall determine the amount necessary for school maintenance during the coming year, and that this amount shall be "sufficient to maintain a school in the manner and for the time provided." There is no suggestion that money may be accumulated for future use. But the provisions for the annual estimate, the annual meeting, and the annual levy of a tax indicate a contrary intention

on the part of the legislature. In addition to the 25-mill limitation, we find the direction to determine the amount of money "required for school maintenance during the coming year, which shall be an amount sufficient to maintain a school in the manner and for the time provided." This provision, when read in the light of the preceding provisions of the section, cannot be said to fix a minimum only, but must be held to fix a maximum as well. If a district has a large sum of money in its treasury, and had no outstanding obligations, why not take this money into account when making the annual levy? In the instant case \$800 is estimated as sufficient for the next ensuing school year, and is more than it required during the preceding year. It has available more than \$700. Shall this sum be taken into account in making the levy? This question was before the court of appeals of Kentucky under a statute like ours. The school board requested a levy of 35 mills, the maximum under the statute. The taxing board found that the district had \$13,000 in its treasury, and reduced the amount of the levy, as plaintiff is seeking to have done here. The court said: "While the statute provides for a tax for school purposes not to exceed in any one year 35 cents on each \$100 taxable property valuation, the school board is not authorized to demand more than is reasonably necessary." *Board of Education v. Nelson*, 109 Ky. 203.

No complaint is made of the estimate, and there is no attempt to deprive the district of money sufficient to meet its expenses. But no reason is advanced for levying a tax to defray expenses when there is money in the treasury available for that purpose. The district court was right in holding that the amount in excess of that required to raise the difference between the amount on hand and the amount needed was levied for an illegal and unauthorized purpose.

The remaining question relates to the levy for building purposes made by district No. 22. Section 11543, Ann. St. 1911, heretofore in substance set out, was the only author-

ity for making this levy. The requirements of that section were not met, and counsel for the district do not contend that the preliminary steps were taken, but say that it was the duty of the county board to pass judicially or quasi-judicially upon the action of the district in voting the tax, and that there is no allegation in the petition nor evidence in the record that the county board erred in making the levy, and that the complaint of want of power to make the levy must be directed against the action of the county board, and not against the school district, and therefore it must be alleged and proved that the county board was without jurisdiction or unauthorized to make the levy. This contention is entirely too technical. Until the district had authorized the levy to be made, the county board was without authority to make it, and without complying with the statute no lawful levy could be made. In *Harmon v. City of Omaha*, 53 Neb. 164, in the body of the opinion it is said: "It is a familiar rule that enactments by which authority for special assessments or levies of taxes is conferred are to be strictly construed. It is also a familiar doctrine that, in order to sustain such assessments, the record must affirmatively show a compliance with all the conditions essential to a valid exercise of the taxing power. *Smith v. City of Omaha*, 49 Neb. 883; *Hutchinson v. City of Omaha*, 52 Neb. 345; *Stenberg v. State*, 50 Neb. 127. The proceedings being without the condition necessary at their inception, they were without authority and the taxes levied were void."

The taxes complained of, having been levied for an illegal and unauthorized purpose, come within the saving clause of section 6491, Rev. St. 1913, and were properly enjoined.

The judgment of the district court is

AFFIRMED.

SEDGWICK, J., concurring.

I think the levy in this case was made for an unauthorized purpose. "Taxes levied in excess of the constitu-

tional limit are for an illegal and unauthorized purpose and are void." *Dakota County v. Chicago, St. P., M. & O. R. Co.*, 63 Neb. 405. Of course, if the levy is in excess of a statutory limit, it would be equally unauthorized. The officers of the school district prepare the budget. They inform the voters at the annual meeting in detail what they consider the district will require to use during the ensuing year. The voters take action upon this report, and decide how much money the district will require for all purposes during the year. This matter is left largely to the discretion of the voters. They determine how much money the district will require to use and inform the county authorities. The school district has nothing to do with the levy. The county authorities have nothing to do with determining how much the district will be required to use. They are authorized to make such a levy as will be necessary, so that the district will have the money it needs for all purposes during that year. If the district will need to use \$800 during the ensuing year, and already has at its disposal more than \$700, any levy in excess of \$100 is unnecessary to furnish the required amount, and the board is not authorized to make an unnecessary levy. It has no such discretion in the matter. It is simply to make such levy as is required to place at the disposal of the district the amount which the district has decided to be necessary for its purposes. If the board levies more than is required for that purpose, it exceeds its authority, and such levy is unauthorized.

FAWCETT, J., dissenting.

The important question in this case is: Can the relief sought by plaintiff be obtained by injunction? Section 6491, Rev. St. 1913, provides: "No injunction shall be granted by any court or judge in this state to restrain the collection of any tax, or any part thereof hereinafter levied, nor to restrain the sale of any property for the nonpayment of any such tax, except such tax or the part thereof enjoined be levied or assessed for an illegal or

unauthorized purpose." That a school district may levy taxes to meet the expenses of the district for the ensuing school year, and that it may also vote a tax for the purpose of creating a building fund, must be conceded. To make such a levy or to vote such a tax is not, therefore, either "illegal" or "unauthorized." In the suit at bar the most that can be said of the levy for expenses during the ensuing school year is that the levy was excessive; and the most that can be said about the tax voted to create a building fund is that the formalities prescribed by statute had not been observed in voting the tax. These facts do not render either the levy for expenses for the school year or the tax for a building fund subject to the charge that they are "levied or assessed for an illegal or unauthorized purpose." Conceding that the former is excessive and the latter irregular, plaintiff would not be entitled to an injunction, for the reason that it had an adequate remedy by appeal from the action of the county board. By such a proceeding the levy could have been adjusted in an orderly manner, and, if excessive, could have been reduced and the amount of plaintiff's just liability for taxes could have been definitely determined. This suit illustrates the wisdom of a statute like section 6491. Public officials, charged with the duty of providing the revenues necessary for any department of the government, should not be interfered with or embarrassed by the extraordinary writ of injunction, except where it is clearly shown that such officials are proceeding fraudulently, or without authority of law, and that the relator has no legal remedy by appeal or otherwise. Moreover, so far as the record shows, the county board acted regularly, without any notice of the fact that the school district board were attempting to obtain an excessive levy, or that they had on hand or under their control any surplus not disclosed by their report.

LETTON and ROSE, JJ., concur in above dissent.

LEOPOLD DOLL ET AL., APPELLANTS, V. CHARLES F. DOLL
ET AL., APPELLEES.

FILED DECEMBER 3, 1915. No. 18344.

1. **Trusts: RESULTING TRUST.** "Where one buys real estate for which he pays the purchase price, and for convenience takes the title in the name of another, the person taking the title will hold the property in trust for the one who pays the purchase price." *Doll v. Doll*, 96 Neb. 185.
2. ———: ———: **STATUTE OF FRAUDS.** "The trust thus created is what is known as a resulting trust, and is not affected by the statute of frauds." *Doll v. Doll*, 96 Neb. 185.
3. ———: ———. The same presumption arises and the same rule obtains in transactions between uncle and nephew as those between strangers.
4. ———: ———: **SUFFICIENCY OF EVIDENCE.** Evidence examined, its substance stated in the opinion, and *held* sufficient to require a finding that the legal title to the several pieces of real estate in controversy in this case were held in trust by Charles F. Doll for August Doll at the time of his death, and in equity were a part of his uncle's estate.

APPEAL from the district court for Douglas county:
JAMES P. ENGLISH, JUDGE. *Reversed in part, and re-
manded, with directions.*

*Howard H. Baldrige, W. A. DeBord, John G. Kuhn,
Louis J. Piatti and John D. Wear, for appellants.*

*John C. Cowin, Guy R. C. Read and George W. Shields
& Sons, contra.*

BARNES, J.

This was a suit in equity to establish a resulting trust in and to certain real estate alleged to have been purchased by August Doll, deceased, and to which the legal title had been placed in the name of his nephew, Charles F. Doll. The issues were the same as those in the case of *Doll v. Doll*, 96 Neb. 185. Therefore we do not deem it necessary to set forth the pleadings in this opinion.

Doll v. Doll.

The trial court held that the resulting trust was established as to the real estate described as: Commencing at a point 84 feet west of the northeast corner of lot 1, Reed's Second addition to city of Omaha, Douglas county, Nebraska, thence west 22 feet, thence south 98 feet, thence east 22 feet, thence north 98 feet to place of beginning, known as the "Hulshizer Hardware Store" property; that as to the west half of lot 2, block 167, city of Omaha, known as the "Festner Printing Plant" property, and lots 17, 18 and 19, block 2, Forest Hill addition to said city, known as the "Festner Home" property, a resulting trust was not established, and the two properties last established were decreed to be the property of the defendant Charles F. Doll. From this decree the plaintiffs have appealed, and the defendants have prosecuted a cross-appeal.

The appellants contend that the trial court erred in holding that a resulting trust was not established as to the two real estate properties last mentioned. This brings us to a consideration of the evidence so far as it relates to those two properties.

Considering the testimony first as to the Festner Printing Plant property, it is sufficient to say that it appears from the evidence of Mrs. Getzschmann, of Dexter Thomas, of the officers of the bank which had the lien on the property, and of other persons, all of whom were competent witnesses, that at the request of the Getzschmanns August Doll purchased the property and paid the purchase price thereof, and as a matter of convenience had the deed for the same made to his nephew, Charles F. Doll, who took no part in the transaction. August Doll himself took possession of the property, and with his own money built a three-story building thereon and leased it to the Getzschmanns. The building was partly destroyed by fire in 1897, and August Doll rebuilt it and extended the lease thereon to 1913. He paid all of the taxes, paid for all improvements, and for all of the repairs on the property, collected all of the rents, and had abso-

lute control and possession of the building up to the time of his last illness. His nephew, Charles F. Doll, never paid any of the purchase price and was never known in the negotiations for the purchase of this property. The evidence, of which we have given merely the substance, shows conclusively that August Doll was the equitable owner of this property at the time of his death, and that Charles F. Doll merely had the legal title as trustee of the resulting trust which existed in favor of his uncle.

There is no conflict in the evidence as to lots 17, 18 and 19, in block 2, Forest Hill addition to the city of Omaha. There is abundant proof in the record that August Doll conducted negotiations for the purchase of this property and paid for it with his own money. The purchase was brought about by Mrs. Getzschmann. It appears that she wanted August Doll to buy the property for a residence for herself and her family. She applied to him to loan her the money to purchase the property. He told her that he would help her get it. They consulted the agent who had it for sale, and, the terms being satisfactory to August, the property was purchased. August paid the purchase price, which amounted to approximately \$12,000. A Mr. Schroeder was the owner of the property at the time of the purchase, and at the request of August Doll, and for his convenience, it was deeded by Schroeder to Charles F. Doll. A contract was made, giving the Getzschmanns an option to pay August Doll for this property, and, when paid for, the Getzschmanns were to have a deed for it. This contract was signed by Charles F. Doll as he had the legal title, and this was all he did in relation to the purchase of the property. August Doll took charge of the deed and the contract with the Getzschmanns, received the interest payments, saw to it that they paid the taxes and kept the property insured, and exercised complete and absolute control over it. The negotiations for the purchase occurred in the fall of 1897, the purchase was concluded in 1900, and the deed was made on June 31 of that year. Later on, in 1907,

August and the Getzschmanns disagreed in relation to these matters and a law suit resulted, after which they came together and settled their differences and new contracts were made.

Mrs. Getzschmann testified that Charles F. Doll never took any part in the negotiations and was never consulted; that he never collected any of the payments on the principal or interest of the Forest Hill property, but that all payments were made to his uncle, August Doll; that August paid the \$8,000 mortgage which was on the property and held possession of the deed, notes and contracts up to 1907; that she saw them in his possession at that time. The amount paid by August as the consideration of the property, as above stated, was \$12,000. Mrs. Getzschmann's evidence was corroborated by the testimony of Mr. Mickle, who acted as agent for the Provident Life & Trust Company, the owner of the mortgage. We are therefore of opinion that, when the deed to this property was made by Schroeder to Charles F. Doll, he took it in trust for his uncle, August Doll, who was in equity the real owner of the property. *Hoehne v. Breitzkreitz*, 5 Neb. 110; *Chicago, B. & Q. R. Co. v. First Nat. Bank*, 58 Neb. 548; *Kobarg v. Greeder*, 51 Neb. 365; *Detwiler v. Detwiler*, 30 Neb. 338; *Doll v. Doll*, 96 Neb. 185. The rule announced in the foregoing decisions applies as well to transactions between uncle and nephew as those between strangers. *Summers v. Moore*, 113 N. Car. 394; *Harris v. Elliott*, 45 W. Va. 245; *O'Neill v. O'Neill*, 227 Pa. St. 334; *Wright v. Wright*, 242 Ill. 71; *Harris v. McIntyre*, 118 Ill. 275; 1 Perry, Trusts and Trustees (6th ed.) sec. 144.

In order to defeat the resulting trust, the defendant Charles F. Doll pleaded and attempted to prove an alleged agreement between himself and his brother, Augustus, and his uncle, August, in substance as follows: That August Doll and defendants Charles F. and Augustus Doll made a valid agreement that the nephews were to give their uncle, August, all the money they then had,

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all that they were able to earn, and all that they could borrow from their brothers and sisters, all of which was to be used and invested by their uncle for the benefit of the defendants; and the said August Doll was to convey the property to defendants Charles F. Doll and his brother, Augustus Doll, as it became convenient for him to do so, and such property as he saw fit to so convey to them should become their property. It must be observed that the date of the alleged agreement was not stated, and defendant Charles F. Doll was unable to testify as to when and where it was made. Neither was he able to testify as to what amount he gave his uncle of his own earnings. It appears, however, that defendant's sisters loaned considerable money, which they had inherited, to their uncle, August Doll, for which he gave his notes to them, signed by himself and Charles F. Doll. It also appears that Charles was guardian for his brother, who was a minor, and loaned some of his ward's money to his uncle. The testimony shows, however, that all of this money, with interest, was repaid to defendant's brother and sisters in the lifetime of August Doll, except \$2,000, which Charles afterwards repaid out of money collected by him on his uncle's life insurance policy. The defendant failed to trace any money of his own as payment of any part of the consideration for the properties in question in this suit. On the contrary, there was evidence which tended to show that Charles owed his uncle, August, \$169 at the time he was taken to the hospital. As we view the evidence, the alleged agreement on which defendant relied was, to say the least, vague and uncertain, and the testimony failed to establish this agreement.

On the argument in this court, counsel contended that August Doll gave the properties in question to his nephew, Charles F. Doll; that August had the right to make such disposition of his property during his lifetime. This fact may be conceded, but, as we view the evidence, it fails to support this contention. August Doll was a successful business man. He was, to a large extent, a dealer in real

estate and a loaner of money. He acquired a large estate. He was frugal in his habits and a lover of money, and, while he was eccentric, his whole life and conduct was such as to convince us that he never intended to give the properties in question in this suit to his nephew. We think this sufficiently disposes of defendant's contentions.

It further appears that, when August Doll was at the hospital, by reason of his last illness, the defendant herein and his brother, Augustus, procured his signature to the following:

"Omaha, Neb., Feb. 9, 1909.

"To all the Tenants and Debtors of Charles F. Doll: You are hereby notified that I hereby resign my agency for my nephew, Charles F. Doll, and the said tenants and debtors of said Charles F. Doll are to pay to the said Charles F. Doll, or to any one empowered by him to collect, any rents, interest or principal due from any of said tenants or debtors to the said Charles F. Doll.

"Witness my hand at Omaha, the date aforesaid.

"(Signed) August Doll.

"In Presence of: Sister Tina Peterson."

Sister Tina Peterson testified in relation to the conversation at the hospital at the time August Doll signed the paper, as follows: "I was asked when I came in to sign a paper, and it seems to me that I hesitated to do so, and then I was told that it was only to enable his nephews to look after his property, and to collect rents, etc., *while he was sick*. * * * Well, the way I remember it was that the—both the nephews and the old man told me what it contained, what the paper contained. * * * Q. It was just to collect them while he was sick? A. That is the way I understood it." It also appears from the testimony that the nephews were very much elated over getting the uncle to sign this paper. Mrs. Reuman testified, in substance, that Augustus Doll, the brother of the defendant herein, said that they had some trouble collecting the rents, but that now they could get them. He said: "We have got so far; we had to do what my

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uncle said, to dance when he whistled: now we have got him; now he has got to do the way we want it." This was in reference to the paper which was signed by August Doll while in the hospital. It also appears that at that time the uncle turned over to his nephews something over \$600 in cash; that he left the hospital about March 1, 1909, and was taken to the house of his nephew, Augustus, where he remained until the time of his death in August, 1910. The evidence is convincing, to our minds, that when this paper was signed August Doll failed to understand the nature of its contents.

After a careful examination of the evidence contained in the record, we have reached the independent conclusion that the district court erred in holding that defendant Charles F. Doll was the owner of lots 17, 18 and 19, in block 2, Forest Hill addition to the city of Omaha, and the west half of lot 2, block 167, city of Omaha, known as the "Festner Printing Plant" property. We further find that these two properties belonged in equity to August Doll at the time of his death. The judgment of the district court, so far as it relates to the Hulshizer Hardware Store property, is therefore affirmed, and, as to the other two properties above described, the judgment is reversed and the cause is remanded to the district court, with directions to enter a decree in accordance with the views expressed in this opinion.

REVERSED IN PART, AND REMANDED, WITH DIRECTIONS.

LETTON and FAWCETT, JJ., not sitting.

SEDGWICK, J., not participating.

STATE, EX REL. WILLIAM S. RIDGELL, RELATOR, V. GEORGE
E. HALL, STATE TREASURER, RESPONDENT.*

FILED DECEMBER 3, 1915. No. 19407.

1. **States: SPECIAL FUNDS: APPROPRIATION.** The fund created by the provision of chapter 23, Rev. St. 1913, and set apart by section 2511 of that chapter as a special fund for the maintenance of the office of state fire commissioner and the expenses incident thereto, may be paid out by the state treasurer on warrants properly drawn by the auditor of state for that purpose without a biennial appropriation by the legislature.
2. **Statutes: TITLE: SPECIAL FUNDS.** Section 19, art. III of the Constitution, does not apply to the use of that fund when the same has been collected.
3. **Mandamus: WARRANTS: FIRE COMMISSION EXPENSES.** The act creating that fund was intended as a continuing appropriation for the payment of the salaries and expenses of the state fire commissioner, and the treasurer may be required by mandamus to pay warrants properly drawn on that fund when collected and in his hands.

Original proceeding in mandamus to compel respondent to countersign and pay a warrant for the salary of relator as deputy state fire commissioner. *Writ allowed.*

Willis E. Reed, Attorney General, and George W. Ayres, for relator.

Burkett, Wilson & Brown and Berge & McCarty, for respondent.

E. J. Hainer, amicus curiæ.

BARNES, J.

This is an action in mandamus to require the respondent, the state treasurer, to countersign and pay a warrant drawn by the auditor of public accounts for \$200 in favor of the relator as chief deputy fire commissioner, drawn on what is known as the fire commissioner's fund, in payment of the statutory salary and the actual and necessary ex-

*Rehearing denied. See opinion, p. 95, *post*.

penses of the relator for the month of September, 1915, in the due and ordinary conduct of his office.

There is no disputed question of fact in this case. This is made evident by the following recital in the brief of the respondent: "The respondent by his answer has endeavored to relieve the state of the proof of the essential facts in this case, and relies upon the want of statutory authority to countersign or pay the warrant involved in this case. The respondent has endeavored to facilitate the presentation of this matter to the court in order that he might be advised as to his duties as state treasurer in reference to the fund in controversy. In the construction of the law, as he finds it, he is unable to find any authority that would justify him in countersigning or paying the warrant involved, and he therefore joins the relator in asking for a construction of the constitution and the statutes involved in this case."

The real question for our determination is whether the respondent is required to pay the warrant in question out of the fire commissioner's fund in his hands, without a specific act of the legislature appropriating said fund during each biennium to the payment of the salary and expenses of the officers administering the state fire department.

Chapter 23, Rev. St. 1913, creates a fire commission, the affairs of which shall be conducted by a fire commissioner and such subordinates as are provided for by that chapter. It makes the governor the fire commissioner, and provides for the appointment of a chief deputy, and defines his duties.

By section 2509, Rev. St. 1913, it is provided: "The chief deputy state fire commissioner shall receive an annual salary of two thousand dollars and each assistant deputy fire commissioner one thousand five hundred dollars, payable monthly, and their actual and necessary traveling expenses while engaged in the duties of their office. The fire commissioner shall employ clerks and assistants and incur such other expenses as may be neces-

sary in the performance of the duties of his office, not to exceed, including salaries, such sum as may be paid into the state treasury in the manner hereinafter provided."

Section 2510, Rev. St. 1913, provides: "For the purpose of maintaining the department of state fire commissioner, and paying the expenses incident thereto, every fire insurance company except Farmers' Mutuals, whether upon the stock or mutual plan, doing business in the state of Nebraska, shall pay to the state treasurer in the month of January, annually, in addition to the taxes now required by law to be paid by such companies, three-eighths of one per cent. on the gross fire premium receipts, after deducting cancelations and reinsurances, of such companies on all business done in Nebraska the year next preceding, as shown by their annual statements, under oath, to the state auditor, which sum shall be paid on or before the first day of January of each year, and no certificate shall be issued by the auditor to or on behalf of any such company, authorizing it to do or continue business in this state while any such percentage or tax remains due and unpaid."

Section 2511, Rev. St. 1913, provides: "The state treasurer shall hold the money so received into the treasury as a special fund for the maintenance of the office of state fire commissioner, and the expenses incident thereto. The state fire commissioner shall keep on file in his office an itemized statement of all expenses incurred by his department, and shall approve all vouchers issued therefor, before the same are submitted to the auditor of state for payment, which vouchers shall be allowed and paid in the same manner as other claims against the state."

It seems clear that the legislature, by the sections of chapter 23 quoted above, not only created a new department of government known as the state fire commissioner's department, but also designated its officers, fixed the amount of their salaries, and provided a special fund for the payment of such salaries and the expenses of ad-

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ministering the department. The fund thus collected may be designated as a trust fund, which, by the terms of the act itself, cannot be used for any other purpose until further legislative action. It is conceded that this fund is amply sufficient for the payment of the warrant in question. Indeed, it is admitted that there is a large surplus of this fund in the hands of the respondent, who contends that he has no authority to pay the warrant in question because the legislature, at its 1915 session, made no specific appropriation of the fund for the payment of the relator's salary and the expenses of administration.

In *Shattuck v. Kincaid*, 31 Or. 379, speaking of appropriations, the court said: "And this gets us back to the original proposition that an appropriation is the setting aside or designation by express direction or by implication of particular funds for the discharge of definite and specified obligations or liabilities, which, however, may be in contemplation, such as will arise in the future, and the appropriation may be continuing in its nature, but the legislative intent to have funds always ready and applicable to their prompt discharge at stated times works out the appropriation, and nothing short of it can have such an effect."

Commonwealth v. Powell, 249 Pa. St. 144, was a like case with the one at bar. The application was for a writ of mandamus to compel the auditor general to draw his warrant on the state treasurer of the state of Pennsylvania in favor of the National Limestone Company on a fund received from the registration of license fees for automobiles, which was appropriated by the terms of the act imposing the fees for the maintenance and repair of the state highways. The opinion of the supreme court of Pennsylvania in that case is instructive and practically determines the questions involved in the case at bar. The constitution of Pennsylvania (Const., art. III, sec. 3) provides: "No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title." Section 15, art. III of

the Constitution of that state, provides: "The general appropriation bill shall embrace nothing but appropriations for the ordinary expenses of the executive, legislative and judicial departments of the commonwealth, interest on the public debt and for the public schools; all other appropriations shall be made by separate bills, each embracing but one subject." Section 16 of the same Constitution provides: "No money shall be paid out of the treasury, except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof." In discussing the questions arising in that case, the court said: "Clearly the disposition of such fees, paid as an incident to the system of regulation, was a matter closely allied thereto, and naturally to be considered by the legislature in connection with the main purpose of the act. The statute would have been incomplete, had it required the payment of fees, without providing for any disposition of them. No argument should be required to show that provisions for attaining various objects, which relate to the general subject of the bill, may be dealt with by its terms, without laying it open to the charge of containing more than one subject. * * * It is further suggested that the act offends against section 15 of the Constitution which provides that 'all other appropriations shall be made by separate bills, each embracing but one subject.'" The court further said: "There are two answers to this contention, each equally persuasive and both conclusive of the question involved. The first is that the act of 1913 was a separate bill when it was considered by the legislature and it contains only one subject within the meaning of the organic law as we have already pointed out in this opinion; the second is that this provision of the Constitution was only intended to apply to the biennial appropriations made by the legislature out of the general revenues of the commonwealth. It has no application to a fund created for a special purpose and dedicated by the act under which such fund is to be created to a particular use. The appropriation of the fund so cre-

ated continues as long as the act which dedicates it to a particular use remains in force."

We think this answers respondent's contention that no money shall be drawn from the treasury except in pursuance of specific appropriations made by law. In the case at bar, the act itself makes the specific appropriation, and provides: "The state treasurer shall hold the money so received into the treasury as a special fund for the maintenance of the office of state fire commissioner, and the expenses incident thereto." Rev. St. 1913, sec. 2511.

State v. Cornell, 60 Neb. 276, cited by respondent in support of his contention, can easily be distinguished from the case at bar. There the appropriation was made from the funds of the state treasury raised by general taxation, and was a part of the general revenue of the state. In the case at bar the appropriation is the special fund raised for the special purpose mentioned in chapter 23, and has nothing to do whatsoever with the general revenue belonging to the state.

By the act in question the legislature clearly intended that the money paid to the treasurer under the act should be applied by the deputy commissioner to the payment of his salary and the expenses of managing his office and performing the duties thereof. The right of the legislature to establish such an office and provide the fund for the necessary expenses, as this act does, is not questioned. The taxpayers, or parties upon whom the burden is cast, are not complaining. The fund has been provided and the services rendered. If the statute is unconstitutional, and if the taxpayers could demand a return of the money, they are not doing so. They made no objection to the act when the money was called for from them. They have (if the act is unconstitutional) voluntarily provided this fund. It is a general rule that parties not affected cannot be heard to challenge the constitutionality of an act of the legislature. We do not think that under the circumstances it is the duty of the custodian of the fund to prevent the application of it to the purposes for which it was provided

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in accordance with the evident intent of the legislature. We are of opinion that it is the duty of the respondent to countersign and pay the warrant in question.

The writ as prayed for is awarded.

JUDGMENT ACCORDINGLY.

LETTON and SEDGWICK, JJ., concur in the result for the reasons stated in the final paragraph of the opinion.

ROSE and FAWCETT, JJ., not sitting.

The following opinion on motion for rehearing was filed January 15, 1916. *Former judgment adhered to.*

1. **Constitutional Law: UNCONSTITUTIONAL STATUTE: MANDAMUS.** "Where a supposed act of the legislature and the constitution conflict, the constitution must be obeyed and the statute disregarded. Ministerial officers are, therefore, not bound to obey an unconstitutional statute, and the courts sworn to support the constitution will not by mandamus compel them to do so." *Van Horn v State*, 46 Neb. 62, 83.
2. ———: ———: **PARTIES.** The court will not declare a statute unconstitutional at the suit of one who is not injuriously affected thereby.
3. ———: ———: ———. The act (Rev. St. 1913, sec. 2500 *et seq.*) plainly directs how the fund created thereby shall be used, and in what manner and by whom it shall be distributed. The only question as to its constitutionality is as to the manner of creating the fund by compulsory payments, and the insurance companies who are required to contribute to the fund are the only parties affected by this constitutional question.

SEDGWICK, J.

We have a very interesting and able brief upon the motion for rehearing. The propositions discussed are: (1) That the legislature cannot enact by general statute a continual appropriation of the funds of the state to some specified purpose. (2) That it is the duty of the state treasurer to guard the funds of the state and to refuse to pay them out to unauthorized parties or for unauthorized purposes. We are satisfied of the correctness of these propositions as stated and discussed in the

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brief. The question is whether they apply and are controlling in this case. We do not intend to criticise the state treasurer for hesitating to pay out this money before the act had been officially construed. "Where a supposed act of the legislature and the constitution conflict, the constitution must be obeyed and the statute disregarded. Ministerial officers are, therefore, not bound to obey an unconstitutional statute, and the courts sworn to support the constitution will not by mandamus compel them to do so." *Van Horn v. State*, 46 Neb. 62, 83. But the law is equally well settled that the court will not declare a statute unconstitutional at the suit of one who is not affected thereby. The state treasurer stands for the state and the people thereof. If the state and the people of the state in general are not injuriously affected by this statute, neither they nor their representative, the state treasurer, can require the court to declare the statute unconstitutional. The class of citizens who pay this tax are not challenging its constitutionality. The legislature, no doubt, could authorize the insurance companies to create a fund to be employed in guarding against unnecessary or incendiary destruction of insured property, and could authorize the state treasurer to act as their trustee in preserving and paying out such funds. The statute must be construed as a whole, and must not be so construed as to render it unconstitutional if such construction can be avoided. If it had contemplated only voluntary contributions to the fund, there would be no question of its validity. If the insurance companies who create this fund were protesting that they ought not to be compelled to pay a tax that does not go into the funds of the state so as to be protected by constitutional safeguards in its expenditure, the power of the legislature to compel such payment would be drawn in question. As they have paid the money without objection on their part, such payment is voluntary. The fund is provided for a special purpose and not as for the use of the state. This is clearly what the legislature intended. Therefore

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the only question is whether the constitution will permit compelling payment of taxes for such purpose, and those who are required to make such payment are the only ones affected by that question. Our former decision is adhered to.

FORMER JUDGMENT ADHERED TO.

ROSE and FAWCETT, JJ., not sitting.

MARTIN SCOTT, APPELLANT, v. UNION PACIFIC RAILROAD
COMPANY, APPELLEE.

FILED DECEMBER 3, 1915. No. 18420.

1. **Carriers: DUTY TO INTENDING PASSENGERS.** Ordinarily it is not the duty of a railroad company to furnish an escort or guide to an intending passenger to protect him from accident, unless it is charged with knowledge from the circumstances that the intending passenger is weak, infirm or defective in such a degree as to necessitate assistance.
2. ———: **ACTION FOR INJURY: PETITION: SUFFICIENCY.** A petition, the substance of which is set forth in the opinion, *held* not to state a cause of action for negligence on the part of a carrier of passengers.

APPEAL from the district court for Keith county:
HANSON M. GRIMES, JUDGE. *Affirmed.*

Wilcox & Halligan and *P. R. Halligan*, for appellant.

Edson Rich, A. Muldoon and *B. W. Scandrett*, *contra.*

LETTON, J.

This is an action to recover for personal injuries. A general demurrer to the petition was sustained. Plaintiff stood upon the demurrer, and judgment of dismissal was rendered. Plaintiff appeals.

The petition is too lengthy to be set forth verbatim. In substance it alleges that plaintiff went to the station of

defendant at Brule for the purpose of taking a train; that at that point its road is double-tracked, trains going west using the north track and east-bound trains using the south track; that the train upon which plaintiff desired to take passage ran east upon the south track; that defendant negligently refused to open the doors on the north side of its east-bound trains, and compelled passengers going east to cross both main tracks, and required plaintiff to cross the tracks in front of the moving east-bound train which he desired to take; that he was suffering from typhoid fever; that there was no agent at the station to sell him a ticket; that by reason of the effects of the fever "his perceptive faculties were so dulled and his reasoning power impaired to such an extent that he was unable to comprehend or understand the danger he incurred in crossing said railroad track, or to accurately estimate the distance which he was from said train, or to consider and reason that the engine and cars of said train extended out over the south side of said south rail of said south track, on which it was running, a distance of three feet, or to understand and comprehend the danger incurred in and around railroad yards in which trains were moving, as they were at Brule, Nebraska, on the evening the injury to plaintiff occurred." It is also charged that the defendant negligently failed to provide a platform or proper place on the south side of the south track for the accommodation of passengers; that from the depot to the south rail of the south main track the ground is covered with gravel to about a level with the top of the rails; that from the south rail of the main track "the space is uneven with a slope to the bottom of the north rail of the south side track." It is averred that the only space for the accommodation of east-bound passengers was eight feet in width between the south rail of the main track and the north rail of the side track; that trains extend out about three feet from the rail on each side; that it was dark at the time the accident occurred; that plaintiff saw his train coming from the west and crossed to the

south side of the main track for the purpose of taking it; that plaintiff "after he had crossed said tracks and proceeded west, and while so proceeding westward, for the purpose of taking said train, was struck on the side by the engine drawing said train, and was knocked down and injured, as will hereafter more fully appear." The further acts of negligence alleged are that the train was run at an excessive rate of speed; failure to blow the whistle or ring the bell at a public crossing about 400 feet west of the depot, or at the public crossing south of the depot; failure to have an agent or other person in the depot to sell tickets; and that defendant had no flagman or watchman on the depot grounds to give passengers proper directions for crossing. It is alleged that plaintiff has suffered permanent injuries and been compelled to pay a large amount of money for medical services and other expenses.

The appellant insists that at the time of the injury the plaintiff was a passenger "being transported," under section 6052, Rev. St. 1913, and that the defendant was therefore absolutely liable for his injuries. This position is not tenable. The plaintiff was not "being transported" at the time of the injury; he had not entered, or was not in the act of entering, the train; he was using his own powers of locomotion, and not being carried or moved by any other agency. The facts alleged do not bring plaintiff within the class of persons to whom the statute applies. *Fremont, E. & M. V. R. Co. v. Hagblad*, 72 Neb. 773, 791. In the consideration of the questions presented, we assume, without deciding, that the plaintiff was a passenger and was entitled to the care and protection which a carrier is compelled by law to extend to passengers. The defendant was therefore bound to exercise the care toward him which the law requires to be exercised when such a relation exists, viz., the highest degree of care and caution. There can be no doubt that, if the plaintiff had been struck by the incoming train while he was in the act of crossing to the south side of the train, the questions as to the negligence of the defendant and the contributory negligence

of plaintiff must have been submitted to the jury. But the petition shows that before the plaintiff was struck he had completed the act of crossing, had proceeded west, "and while so proceeding westward, for the purpose of taking said train, was struck on the side by the engine." It is not alleged that there was any engine or cars standing or moving on the side track at the time, or that there was anything to prevent the plaintiff from walking farther away from the rails. The proximate cause of the accident was that the plaintiff carelessly walked too close to the track.

As to the alleged negligence of defendant with respect to failure to open the doors on the north side of east-bound trains, failure to provide a proper platform, to light the tracks, to furnish a man to conduct passengers across the track, in running the train at an excessive rate of speed without ringing the bell or blowing the whistle, failure to open doors on the north side was a reasonable precaution to protect embarking passengers from trains going west on the adjacent main-line track, and none of the other facts alleged could have caused or contributed to plaintiff's injury, except, perhaps, the failure to have a watchman or flagman "to see that the passengers desiring to take said train were conducted over said tracks to the south side thereof on said public crossing, or to give passengers proper directions for crossing said tracks, and taking said trains." But, since the crossing had been safely passed before the accident, no negligence in this respect could cause it.

The only other question involved is whether the allegations of the petition with respect to plaintiff's physical and mental condition imposed the duty of greater care upon the defendant towards the plaintiff than it owed toward an ordinary passenger. It is not alleged that notice of this condition was brought home to defendant or any of its agents in any manner whatsoever. We have no doubt that, if such notice had been given, it would have been the duty of defendant to exercise greater care to see

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that the plaintiff safely took passage than it owed to ordinary passengers; but, in the absence of such knowledge, we fail to see wherein the defendant was guilty of negligence in this respect. *Louisville & N. R. Co. v. Crunk*, 119 Ind. 542; *Illinois C. R. Co. v. Cruse*, 123 Ky. 463, 8 L. R. A. n. s. 299, and note. The petition alleges that the plaintiff went to "said depot and found no agent or other person in same to direct him or to sell him a ticket," but it is also stated that he "saw said agent with a lantern down to the west of the depot on the south side of said south main track." It is to be presumed, since there is no allegation to the contrary, that when the plaintiff saw the agent out near the track with a lantern he was there in the exercise of his proper duties.

The accident is much to be regretted, but we are of opinion that the petition does not allege any act of negligence on the part of the defendant which was its proximate cause. This is the view which was taken by the district court, and its judgment is therefore

AFFIRMED.

FAWCETT and HAMER, JJ., not sitting.

CUSTER COUNTY, APPELLANT, V. JOHN E. CAVENEE ET AL.,
APPELLEES.

FILED DECEMBER 3, 1915. No. 18467.

1. **County Treasurers: LIABILITY FOR INTEREST.** "A county treasurer is not liable on his bond for interest which he has not collected and has been unable to collect upon the public funds in his care, unless it appears that some act or neglect of his has prevented or hindered the collection of such interest." *Hamilton County v. Cunningham*, 87 Neb. 650.
2. **County Depository: LIABILITY FOR INTEREST.** In such a case, where there is no proof of any collusion or bad faith, and it appears that no interest or profit was received by the treasurer, and that the bank continuously had on hand in cash a sufficient amount over its legal reserve to pay the entire deposit, the bank is equally free from liability.

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APPEAL from the district court for Custer county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

J. R. Dean and C. W. Beal, for appellant.

Silas A. Holcomb, Sullivan, Squires & Johnson and C. L. Gutterson, *contra.*

LETTON, J.

This is an action against John E. Cavenee, formerly county treasurer of Custer county, and the Custer National Bank, to recover \$929.47 as interest on county funds deposited in the defendant bank by Cavenee while county treasurer, in excess of the amount for which the bank has qualified as a legal county depository. Judgment for defendants, and plaintiff appeals.

Cavenee was elected treasurer of Custer county in 1905, and assumed the duties of the office in January, 1906, serving for the years 1906 and 1907. He was reelected in 1907 and served until January, 1910. The Custer National bank had taken proper steps to be made a legal depository for that county to the extent of \$4,000 for the years 1906 and 1907, and to the extent of \$8,000 for 1908 and 1909. During each of his terms Cavenee, as county treasurer, deposited in the bank county funds in excess of the amount which the bank was entitled to receive as a county depository. The bank has paid to the county all interest due upon the money which could be legally deposited in it as such depository. The safe and vault provided by the county for the keeping of its funds were insecure and not burglar proof, and the county authorities were aware of this fact. A number of other banks in the county had qualified as depositories. The amount for which the depository banks qualified did not equal the amount of money which the treasurer often had on hand, so that he was often compelled to keep on deposit in these banks excess funds for safe-keeping. During all of this time the defendant bank kept cash on hand over its legal reserve in excess of the amount of county money deposited. It

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is shown that the county treasurer had on deposit in all county depositories the full amount which each was entitled to receive, and in some of them excess funds, except in six banks situated in various towns in the county at a greater or less distance from the county seat, some of them many miles distant by rail, in which banks the amount on deposit varied. Section 6662, Rev. St. 1913, prohibits the deposit of more than an amount equal to 50 per cent. of the capital of each depository bank, and it is not shown that the amount deposited in each of these banks was less than this. No complaint is made in the petition as to any wrongful act or omission as to these banks, none has been proved, and none will be presumed. Defendant Cavenee, as county treasurer, and the bonding company which furnished the bonds, in 1906, procured letters to be written to and corresponded with the various banks of Custer county, urging them to become legal depositories, and informing them that, if the banks of the county did not become depositories to an amount sufficient to receive the county funds, the money might be sent out of the county for safe-keeping. Mr. Cavenee afterwards urged the banks of the county and city, including the defendant bank, to give larger bonds and become legal depositories for larger amounts than they were permitted to receive, which the banks refused to do, except the defendant bank, which increased its bond to \$8,000 during his second term.

The question presented is whether, if a county treasurer deposits money in a bank in excess of the amount for which it has qualified as a county depository, is he, or is the bank, liable for interest on such excess deposits. The evidence fails to disclose any act of negligence upon the part of Cavenee. The county treasurer is the legal custodian of the funds which have not been deposited in the depositories. *State v. Whipple*, 60 Neb. 650. The liability of a county treasurer for money deposited in a depository bank in excess of the amount apportioned to it by the county board is the same as if the bank were not a legal

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depository, and he is liable upon his official bond therefor. He is released by section 6665, Rev. St. 1913, from liability as to the amount which the county board apportions to a depository bank under its bond, but is personally liable for all other funds. It is plain that the treasurer would not have exercised ordinary good judgment if he had kept a large amount of funds in the only places afforded by the county authorities in which money could be kept.

The principal questions in this case have been settled by the cases of *Hamilton County v. Cunningham*, 87 Neb. 650, *Hamilton County v. Aurora Nat. Bank*, 88 Neb. 280, and *Furnas County v. Evans*, 97 Neb. 54. The first of these cases was brought to recover from a former county treasurer for interest on county money deposited in a bank which was not a legal depository. The court held that, since it appeared that the transaction was entered into in good faith by the treasurer in order to provide a safe place for the money, the treasurer was not liable for interest, and that a county treasurer is not liable on his bond for interest which he has not collected, and has been unable to collect, upon the public funds in his care, unless it appears that some act or neglect of his has prevented or hindered the collection of such interest. The second case was brought against the bank in which the money was deposited, and it was held that, if the transaction was in good faith and the treasurer was not liable for failure to collect interest, the bank was also free from liability. These cases were followed and the principles reiterated in the *Furnas County* case mentioned. While the facts are not entirely identical with those in each of these cases, the principles apply. Several other matters are discussed in the brief, but these questions are determinative of the case.

The judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

COMMERCIAL NATIONAL BANK OF KEARNEY, APPELLEE, v.
W. H. FASER ET AL., APPELLANTS.

FILED DECEMBER 3, 1915. No. 18496.

1. **Attachment: REDELIVERY BOND: VALIDITY.** A redelivery bond was executed and filed by one of the principals therein with the clerk of the district court with the purpose to procure the release of certain goods attached. The sheriff, by the consent and direction of the attorney for the plaintiff in the attachment suit, thereupon released the levy. *Held*, that since the bond accomplished its purpose and was in fact accepted and approved, the facts that it was not manually delivered to the sheriff and no approval was indorsed thereupon did not invalidate it either as to the principals or to a surety company who signed as security.
2. **Assignments: ACTIONS: PARTIES: REDELIVERY BOND.** One who purchases choses in action during the pendency of a suit thereon may carry on the suit in the name of the original plaintiff, and may maintain an action in the name of the original plaintiff and obligee in a redelivery bond given to secure the return of property attached in the suit.
3. **Election of Remedies: ESTOPPEL.** A mere attempt to pursue a remedy or to claim a right to which a party is not entitled, without obtaining legal satisfaction therein, will not deprive him of a right to which he is properly entitled.
4. **Attachment: ACTION ON REDELIVERY BOND: BURDEN OF PROOF.** Where attached property has been surrendered under a redelivery bond, the burden of proof is upon the attachment debtor to whom it has been surrendered to account for its loss or nonproduction.
5. **Estoppel: REDELIVERY BOND: OWNERSHIP OF PROPERTY.** A principal in a redelivery bond given to secure the surrender of attached property is estopped to assert that he is the owner of it in an action upon such bond.

APPEAL from the district court for Buffalo county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed*.

W. D. Oldham and John A. Miller, for appellants.

H. M. Sinclair and N. P. McDonald, contra.

LETTON, J.

This is an action against the principals and surety upon a redelivery bond. The court found for the plaintiff, and defendants appeal.

Certain property was attached in an action against George W. Faser and W. H. Faser, and, in order to obtain its release, the bond sued upon was given. It was signed by the Fasers as principals and by the Lion Bonding & Surety Company as surety. Prior to the execution of the bond the sheriff had taken possession of a large amount of personal property in the hands of W. H. Faser, which was situated upon the farm of one of the defendants, and a caretaker was placed in charge of it. It is argued there is no evidence of the delivery of the bond. It was filed in the office of the clerk of the district court by George Faser in the suit pending, but no actual manual delivery to the sheriff was made. It is shown, however, that, when it was made known by the defendants, or one of them, to the attorney for the plaintiff in the attachment suit that the bond had been executed and delivered to the clerk of the district court, the attorney caused the attached property to be released by the sheriff from the lien of the attachment. The bond is somewhat defective in form, since the property was appraised at \$4,920.50, and the penalty is fixed at the sum of \$6,200, while section 206 of the Code requires that the bond be in double the amount of the appraised value of the attached goods.

It is argued that the bond was not accepted and approved by the sheriff, and is therefore void. This was not formally done, but the facts that the plaintiff, who stood back of the sheriff and for whom the sheriff was acting, was satisfied with it and the sheriff yielded possession of the property on account of its execution and delivery are sufficient, we think, to establish an actual approval. The instrument effectually served the purpose for which it was given. *Holt County v. Scott*, 53 Neb. 176. In *Fidelity & Deposit Co. v. Bowen*, 123 Ia. 356, it is said: "The object of the bond is the discharge of the attachment, and if

this be accomplished by its delivery, it is of no concern to the sureties that its sufficiency has not been passed upon by the sheriff or clerk. But the plaintiff, for whose protection the bond is executed, may waive the formal approval by these officers, and accept it as tendered under the statute, without invalidating its efficacy as a statutory release bond." An expression somewhat to the contrary was used in *Cortelyou v. Maben*, 40 Neb. 512, but in that case the property had not been delivered into the hands of the defendant, so far as the record discloses, and the statement was mere *obiter*.

It is next contended that the plaintiff has no corporate existence; that it is not the owner of the cause of action, and cannot maintain the suit. This contention is based upon the fact that, when the attachment suit was begun, the Commercial National Bank was a going concern. After the suit was begun the notes in suit were sold and transferred to T. B. Garrison, and it is stipulated that the bank has liquidated its affairs. Section 45 of the Code provides that, in case of a transfer of any interest in an action during its pendency, the action may be continued in the name of the original party. The original action proceeded to judgment in the name of the bank, and, since it is the obligee named in the bond and this action is merely ancillary to the attachment suit, we see no reason why the action cannot proceed in the name of the original judgment creditor. *Harman v. Harman*, 62 Neb. 452.

It is next claimed that the original case is pending in the supreme court and the judgment superseded. The supersedeas bond was given by W. H. Faser alone, the action was dismissed as to him, and the cost bond given has no effect to stay the execution of the judgment.

One of the principal contentions in the case is that, since before this suit was brought the plaintiff had begun an action which is still pending against the sheriff of Buffalo county and the surety upon his official bond to recover the value of the attached property, on the ground

that it was unlawfully surrendered by him and lost, destroyed and dissipated, he has elected between two inconsistent remedies, and cannot, therefore, maintain this suit. The defendants in this action are strangers to the action against the sheriff. If a judgment should be recovered against them in this action upon the theory that the redelivery bond is valid, and this fact is shown in the other suit, it would seem that no subsequent judgment could be rendered against the sheriff in that suit upon the inconsistent theory that it was he who had dissipated the property. Whether this is correct or not, in any event, if the defendants satisfy this judgment, no other judgment could be enforced. Even though two judgments existed, there could be but one satisfaction. A mere attempt to pursue a remedy or to claim a right to which a party is not entitled, without obtaining legal satisfaction thereon, will not deprive him of a right to which he is properly entitled. The sheriff testified that after judgment was rendered he could find none of the property; that he made a demand for it upon George W. Faser, who told him that part of it was destroyed by fire and the remainder had been sold. It is claimed by defendants that the burden of showing a negligent loss or wrongful disposal of the property rests upon the plaintiff. All the facts with regard to the loss or destruction of the property being peculiarly within the knowledge of the defendants who were in its possession, the law casts the burden upon them to explain what had become of it. It appears, also, that the property which was destroyed by fire was covered by insurance, and the proceeds of the policy were paid to one of the principal defendants.

It is contended that the court erred in the exclusion of evidence to show that W. H. Faser, and not George W. Faser, was the owner of the property. By the giving of the bond, W. H. Faser waived any claim of his against the right of the sheriff to the possession of the property. If he owned it, he could have taken it from the officer by proceedings in replevin, or he might have maintained an

action against the sheriff for conversion. Instead of taking either of these courses, he entered into a bond that, if the sheriff would release the property, it would be forthcoming to await the judgment of the court in the action. Having secured possession of the property by giving the bond, it is too late for him to assert ownership as a defense, and he has estopped himself from taking such a position. The judgment of the district court is

HAMER, J., not sitting.

RACHEL M. BAILEY, APPELLEE, v. UNITED STATES FIDELITY
& GUARANTY COMPANY ET AL., APPELLANTS.

FILED DECEMBER 3, 1915. No. 19272.

1. **Master and Servant: INJURY TO SERVANT: COMPENSATION ACT: PAYMENT IN LUMP SUM.** Under section 3681, Rev. St. 1913, of the workmen's compensation act, after the amount of compensation payable has been fixed either by agreement or by the decision of a court, the parties may agree for the payment of a lump sum in lieu of the periodical payments. There is no provision in the statutes allowing either party to compel the employer to pay, or the workman or dependent to receive, a lump sum satisfaction.
2. ———: ———: **AGREEMENT AS TO COMPENSATION: SURETY.** If an employer and the party to whom payment is to be made make a reasonable agreement in good faith for the payment of a lump sum not inconsistent with the amount of the periodical payments previously determined, the agreement will bind an insurance company, which has assumed a risk under section 3688, Rev. St. 1913, equally with the employer. It has no greater rights than he has, and cannot block a settlement by objecting to payment in a lump sum merely because it was not consulted.
3. ———: ———: **COMPENSATION: COMMUTATION.** Commutation is a departure from the normal method of payment, and is to be allowed only when it clearly appears that the condition of the beneficiaries warrants such departure.

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4. ———: ———: AGREEMENT AS TO COMPENSATION. There is no requirement in the section of the statute which applies to residents of this country that six months must elapse before an agreement for a lump sum payment may be made, or the consent of the district court be procured to such an agreement.
5. ———: ———: COMPENSATION:- COMPUTATION. A lump sum settlement made by taking the present value of the periodical payments computed at 5 per cent. simple interest is not erroneous.

APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Affirmed.*

Strode & Bechtol and Burkett, Wilson & Brown, for appellants.

B. F. Good, A. W. Richardson and A. M. Bunting, contra.

LETTON, J.

The husband of plaintiff was accidentally killed while in the employment of defendant Apperson, and under the provisions of the workmen's compensation act she became entitled to receive from him the sum of \$10 a week for 350 weeks. Apperson held a policy with the defendant United States Fidelity & Guaranty Company to cover the risk. Each of the defendants admits liability to make these payments. The controversy arises over whether the plaintiff can, as she asks in her petition, compel the insurance company to commute the amounts due so that she may recover a lump sum instead of the weekly payments provided for by the act. The court found for the plaintiff, and judgment was rendered in a lump sum for \$2,968.62. Defendants have appealed. The insurance company insists that the court erred in assuming jurisdiction over the case, in refusing to hold that the action was prematurely brought, and in fixing the amount of recovery.

In his answer defendant Apperson says: "That he is willing and hereby consents to such composition and the payment of such lump sum in discharge of the obligations of said policy as to the court may seem just and proper, provided the court shall find that this is a proper case

in which to allow such compromise and compensation." A joint motion for new trial was filed on behalf of defendants, and joint notice of appeal was given. The petition sets forth facts showing that the financial circumstances of the plaintiff are such that it would be for her best interests and those of her children to allow the payments to be made in a lump sum and invested for her benefit, and the evidence sustains the allegations. It asks the court to determine that sum to be \$3,086, and to enter judgment for that amount. The defendant insurance company denies there has been any agreement to pay a lump sum in lieu of the weekly payments, but says that, if it is compelled to pay such a sum, it should not be in excess of \$2,364.86.

Section 3681, Rev. St. 1913, of the workmen's compensation act, provides: "The amounts of compensation payable periodically under the law, either by agreement of the parties, or by decision of the court, may be commuted to one or more lump sum payments, except compensation due for death and permanent disability. These may be commuted only with the consent of the district court."

The insurance company argues that, if the legislature had intended that the district court had authority to order such a payment without a prior agreement of parties, it would have so stated; that the act implies that a previous agreement must have been reached which will be ratified by the district court, and that without such an agreement the court cannot compel such a commutation of payments. We agree with this construction. The meaning of section 3681 seems to us to be that after the amount of compensation, payable periodically, has been fixed, either by agreement, or, in case of a controversy, by the decision of a court, the parties may, if they so desire, agree for the payment of a lump sum in lieu of the periodical payments. The lump sum by sections 3682, 3683, Rev. St. 1913, is made final, and is not subject to modification as periodical payments are. In case the amount agreed upon is for compensation for death and

permanent disability, the agreement cannot go into effect until it has been submitted to the district court and its consent has been given thereto. We do not feel at liberty to transpose the language of this section, as plaintiff desires, and change its meaning so as to make commutation compulsory. The meaning is not ambiguous. The fact that the legislature did not express such a thought, while many such statutes do, is significant.

The statute leaves the question of how much shall be paid in a lump sum in ordinary cases to the agreement of interested parties, but in such serious matters as death and permanent disability, where the interests of those dependent upon the workman may be involved, the question of whether it is for the best interests of the dependents to have the payments made periodically or to be made in a lump sum must be submitted to the district court, acting in a capacity somewhat analogous to that of a guardian or next friend of the dependents, for its approval or rejection. The object of this provision evidently is to preserve the rights of a class of persons who are often inexperienced in business matters and unable to protect themselves, and to determine whether it is to their best interests to substitute a lump sum, which might easily be dissipated, for the payments made in lieu of wages.

An investigation as to the provisions of the workmen's compensation laws in other countries, and in other states in this country, has disclosed that almost without exception such provisions are contained in the statutes. In some jurisdictions the lump sum payment may be made by agreement of parties, but in the majority the question whether it shall be permitted is left to the determination of an administrative board or to the judgment of a court. In some states it can be made by the tribunal on the application of either party; in some the matter is within the discretion of the court or commission, with or without the consent of either party; in some states six months must expire before the agreement or the application to the

court may be made. The manner in which the lump sum is to be arrived at or must be computed is also fixed in some states, while in others the matter is left as in this state.

The New Jersey statute, as amended in 1913, not only fixes the rate and manner of computation, but indicates the principles which shall guide the court in passing upon such an application. Section 21 of the act is, in part, as follows: "In determining whether the commutation asked for will be for the best interest of the employee or the dependents of the deceased employee, or that it will avoid undue expense or undue hardship to either party, the judge of the court of common pleas will constantly bear in mind that it is the intention of this act that the compensation payments are in lieu of wages, and are to be received by the injured employee or his dependents in the same manner in which wages are ordinarily paid. Therefore, commutation is a departure from the normal method of payment and is to be allowed only when it clearly appears that some unusual circumstances warrant such a departure. Commutation shall not be allowed for the purpose of enabling the injured employee, or the dependents of a deceased employee, to satisfy a debt, or to make payment to physicians, lawyers, or any other persons." N. J. Laws, 1913, ch. 174, p. 309. It seems to us that the New Jersey legislature determined correctly the principles that should govern in passing upon such an application. The law should be administered with due regard to the preservation of the means of support, and in ordinary cases the normal method should not be departed from. Section 3684 of our statute indicates the general purpose and intent that the fund shall not be dissipated. It provides, in substance, that, after the amount of an award has been agreed upon, a sum equal to the present value of all future installments may, where death has rendered the amount of future payments certain, by leave of the court, be paid by the assured or com-

pany paying the risk to a savings bank or trust company, to be held in trust for the employee or dependents.

We find nothing in the statute to justify the claim that if the employer and the workman, or the dependent person to whom payment is due, agree upon a lump sum in lieu of the periodical payments, an insurance company has any right to object to the manner of payment agreed upon by the parties by the consent of the court. By section 3688 it is provided: "No policy of insurance against liability under this article shall be made unless the same shall cover the entire liability of the employer thereunder.

* * * Every contract for the insurance of the compensation herein provided for, or against liability therefor, shall be deemed to be made subject to the provisions of this article, and provisions thereof inconsistent with this article shall be void." This seems to give the insurance company no greater rights than the employer. A reasonable agreement made in good faith between the parties for the payment of a lump sum, not inconsistent with the amount of the periodical payments previously determined, binds the insurance company equally with the employer, and it cannot block a settlement by objecting to payment in a lump sum merely because it was not consulted. The evidence in this case clearly shows that the insurance company was willing to commute if the sum could be agreed upon.

As to the second error assigned, we find nothing in the statute to prevent the matter of a lump sum agreement being submitted to the court before six months have elapsed. It is hardly necessary to pass upon the assignment that there is error in the amount of the recovery, since defendant Apperson is not complaining of the amount, and the motion for a new trial is a joint one. But, since the statute is not clear, and the question may arise again, we indicate our views. In section 3684 the amount that may be paid by an employer to a trust company or savings bank for dependents is to be ascertained by taking "the present value of all future installments of compensation," and in section 3663 the amount which

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may be paid by an employer for the benefit of nonresident alien dependents is fixed as two-thirds of the total amount of future installments. It is urged that the latter basis is the proper one. We are of the opinion that the legislature intentionally distinguished between residents and nonresident aliens and gave the former the preference. The present value of all future installments should be considered as the true basis for the adjustment. The district court properly adopted this method of computation, and was justified in fixing the rate at 5 per cent., which is the statutory rule in several states.

In conclusion, the employer and the dependent in this case both consented that commutation might be made. The amount was left by them to be fixed by the district court. It has been fixed at a reasonable sum, and the employer is willing that this sum be paid. While the proceeding has been different, the result is the same as if the parties had consented to settle, had agreed as to the amount out of court, and had come into court to procure its consent to the agreement.

We find no prejudice to the defendant in the manner pursued, and no reason to interfere with the judgment of the district court. Its judgment is therefore,

AFFIRMED.

FAWCETT, J., dissents.

SEDGWICK, J., not sitting.

INDIANA BRIDGE COMPANY, APPELLANT, v. HERBERT
HOLLENBECK ET AL., APPELLEES.

FILED DECEMBER 3, 1915. No. 18422.

1. **Novation.** "There can be no novation of a debt in the absence of an unqualified discharge of the original debtor by the creditor." *Western White Bronze Co. v. Portrey*, 50 Neb. 801.

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2. ———: DISCHARGE: ASSIGNMENT. An order assigning to a creditor money to become due from the state to a public building contractor, which was accepted by the state, is not a bar to an action against the contractor for a balance due on the order, where it was not agreed that such assignment should discharge the debtor's obligation.

APPEAL from the district court for Lancaster county:
P. JAMES COSGRAVE, JUDGE. *Reversed.*

Hall & Bishop, for appellant.

George W. Berge and Brogan & Raymond, contra.

ROSE, J.

This is an action by the Indiana Bridge Company against the partnership of Hollenbeck & Thompson, contractors, and their surety, the United Surety Company, for the balance due for materials furnished in erecting the stock pavilion at the state fair grounds in Lincoln. In the trial court judgment was entered in favor of plaintiff and against the surety, but discharging the principals, Hollenbeck & Thompson. Plaintiff has appealed, and the surety company has filed a cross-appeal.

The petition alleges that the balance due plaintiff was \$869.26. E. H. Thompson, one of the contractors, for his separate answer, alleged that when the work was about completed, and when the state was owing them \$8,575, and when the contractors were owing plaintiff \$8,400, the latter and the contractors entered into the following agreement:

"This agreement, signed by E. H. Thompson, of University Place, Nebraska, for the firm of Hollenbeck & Thompson, contractors for the structural steel work for the live stock pavilion in the state fair grounds, and C. M. Kimbrough, of Muncie, Indiana, for the Indiana Bridge Company, of Muncie, Indiana, is to this effect:

"That the said Indiana Bridge Company did furnish, according to the plans and specifications, the structural steel for the live stock pavilion located on the grounds of

the State Agricultural Society at Lincoln, Nebraska, and that the said Hollenbeck & Thompson are indebted to the said Indiana Bridge Company in the total sum of eight thousand and four hundred dollars (\$8,400); all matters of difference having been fully discussed and the above amount agreed upon by and between the said E. H. Thompson and the said C. M. Kimbrough in the presence of A. H. Thompson, of University Place, Nebraska.

"And it is hereby further agreed, by and between the above-named persons, that when the state board of public lands and buildings shall make allowance on the claims of the said Hollenbeck & Thompson, the same shall be payable to the Indiana Bridge Company, to the amount of eight thousand and four hundred dollars (\$8,400).

"And it is further agreed that the secretary of state, as clerk of said board of public lands and buildings, shall be custodian for these funds, and he is hereby directed to forward said allowance in auditor's warrants or treasurer's checks to the said Indiana Bridge Company, at Muncie, Indiana, until the full amount of eight thousand and four hundred dollars (\$8,400) has been paid.

"And it is further agreed and understood that the said E. H. Thompson, acting for Hollenbeck & Thompson and for himself and for A. H. Thompson, shall not present any other or additional claim, nor allow any one else to do so, for any money or other allowance, to the architect or superintendent, or to the state board of public grounds and buildings, for allowance from the sum of eight thousand five hundred and seventy-five dollars (\$8,575) now due to the said Hollenbeck & Thompson, until the full amount of eight thousand and four hundred dollars (\$8,400) has been allowed and fully paid to the said Indiana Bridge Company.

"And the said E. H. Thompson, acting for and in behalf of the firm of Hollenbeck & Thompson, further agrees that he will prosecute with diligence the unfinished part of the work of the stock pavilion, so that so far as that

part of the building for which the said Hollenbeck & Thompson are contractors is concerned the same shall be completed on or before June 1st next."

In Thompson's answer it was also alleged: "That, by the terms of said contract, said Hollenbeck & Thompson assigned to the plaintiff the sum of \$8,400 of the moneys then belonging to said Hollenbeck & Thompson and in the possession of the state of Nebraska; that a copy of said contract was given to the state of Nebraska, and accepted by it, and that, by the terms and conditions of said contract, the title to \$8,400 of the funds of said Hollenbeck & Thompson in the hands of the state of Nebraska, was thereby assigned to the plaintiff, and was a full settlement between the plaintiff and said Hollenbeck & Thompson, and a full payment of all sums and claims due from said Hollenbeck & Thompson to the plaintiff, and this defendant says that the firm of Hollenbeck & Thompson and this defendant have fully paid the plaintiff all that is due it under said contract of settlement."

The reply admitted the execution of the contract pleaded by Thompson, but challenged his construction thereof, and denied that the assignment of the \$8,400 due from the state was intended as a full settlement of plaintiff's claim, and also denied that it constituted payment. It was further alleged in the reply that the contractors failed to complete the building, that the state was compelled to and did complete the same, and that "there was not left sufficient funds with which to pay all of the \$8,400, but the state did pay to the plaintiff, and the same was credited upon the \$8,400, all that was left as a balance due Hollenbeck & Thompson under their contract with the state, after the state had completed the said building."

Both plaintiff and defendant Thompson moved for judgment on the pleadings.

Defendants Hollenbeck & Thompson contend that the contract set out in the answer constitutes an equitable assignment or novation. The rule is: "There can be no novation of a debt in the absence of an unqualified dis-

charge of the original debtor by the creditor." *Western White Bronze Co. v. Portrey*, 50 Neb. 801.

In *Bonnemer v. Negrete*, 35 Am. Dec. 217 (16 La. 474) it was held: "Acceptance by a creditor of an order on a particular fund, for the amount of his debt, is not sufficient to constitute a novation, unless the original debtor was, by express agreement, discharged."

In the present case plaintiff sued for the balance due on the claim for \$8,400 after crediting the contractors with all money due them from the state. The answer does not show that there was an agreement expressly releasing the contractors from liability, or that the parties intended the new agreement in itself to be a discharge of the original obligation. Under the circumstances the allegations in the answer that the agreement constituted a full settlement and full payment and that defendants had fully paid plaintiff all that was due under their contract were conclusions of law.

It follows that the answer fails to state a defense to the petition, and that the judgment releasing the contractors was erroneous. The judgment against the surety was also erroneous, since the record does not justify its affirmance on the ground that it was entered by confession. Both judgments are therefore reversed and the cause remanded for further proceedings.

REVERSED.

FAWCETT, J., not sitting.

FARMERS & MERCHANTS NATIONAL BANK OF FREMONT ET AL., APPELLEES, v. SHERMAN D. WORDEN ET AL.; MARGARET WORDEN, APPELLANT.

FILED DECEMBER 3, 1915. No. 18450.

Fraudulent Conveyances: PARENT AND CHILD: BURDEN OF PROOF. Where a transfer of personal property from a son to his mother in payment of a past-due indebtedness is attacked by judgment creditors as

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fraudulent, the burden is upon the transferee to show that the indebtedness was genuine, that the transaction was honest and that the transfer was made in good faith, but where these facts are shown by uncontradicted testimony of the parties to the transfer and appear to be reasonable and to be consistent with honesty and fair dealing, when considered with surrounding conditions and circumstances, it may be upheld.

APPEAL from the district court for Boone county:
GEORGE H. THOMAS, JUDGE. *Reversed, with directions.*

Frank D. Williams, J. A. Price and C. J. Campbell, for appellant.

M. B. Foster, A. E. Garten and W. J. Courtright, contra.

ROSE, J.

By means of a bill of sale reciting the consideration to be \$3,680.05, Sherman D. Worden, defendant, transferred to his mother, Margaret Worden, defendant, personal property, consisting of cattle, grain and farm implements. Plaintiffs are judgment creditors of the transferor. The present action was brought for the purpose, among others, of subjecting to the payment of the judgments in favor of plaintiffs the property described in the bill of sale. The transferee defended the action on the ground that the transfer to her was made in good faith, for a valuable consideration, without any intention of defrauding creditors of transferor or of hindering or delaying them in the collection of their claims. The trial court rendered a decree in favor of plaintiffs, and the transferee has appealed.

What a court of equity should decree under the evidence is the question presented by the appeal. With a view to reaching a correct conclusion, the testimony has been considered from every standpoint in the light of all of the circumstances proved, without finding any justification for setting aside the transfer. The bill of sale was executed January 28, 1911. The judgments at law on which the creditors' bill is based were not rendered until July 26, 1911. Uncontradicted testimony of the parties to the

bill of sale tends to establish the following facts: From 1905 to 1910 the transferor, as tenant under an oral lease, lived with his father and mother on their homestead, consisting of a farm in Boone county. During the first and second years of the tenancy the crops were to be divided. For the remainder of the five-year period, the agreed rental, payable to the father of the tenant, was \$500 a year in cash. The son had agreed to pay his mother for boarding him and his hired men \$12 a month each. He sold live stock belonging to her and owed her the value thereof. During the five-year tenancy, he incurred an indebtedness to his mother aggregating about \$1,800, which remained unpaid at the date of the transfer. He failed to pay his father the agreed rental, but executed and delivered to him a note for \$1,850, November 10, 1910. His father died November 30, 1910. On his deathbed he handed the note to his son, and directed him, in case anything happened, to pay it directly to his mother. Early in December, following the death of the father, the son handed to his mother an envelope containing the note, saying it was something belonging to her. She preserved it, not knowing what it was until some time later. The note itself is in the record. The day before the son signed the bill of sale he executed in favor of one of his creditors a renewal note for \$3,680.05. This note was signed by his mother as surety upon his promise to deed to her an estate in remainder in 80 acres of land devised to him by his father and to pay his existing indebtedness to her. Pursuant to this agreement she became surety on his renewal note, and he, for the expressed consideration of \$3,680.05, conveyed to her his interest in the realty described. In addition, the mother testified that, a week before the bill of sale was executed, she had talked with her son about transferring his personal property to her, that he had said he would give her a bill of sale to indemnify her for signing his note, and that they had also talked about the unpaid board bill. This uncontradicted evidence is convincing proof of the son's indebtedness to his

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mother, of the sufficiency of the consideration for the bill of sale, and of the good faith of the parties to it. The incurring of debts, the signing of notes, and the giving of security were familiar practices of the transferor. It is not strange that his mother became his creditor, or that she allowed his obligations to run for years, or that he was willing to indemnify her against loss. Though she did not know of the existence of the note for rental, when the bill of sale was executed, her son had been directed to pay her the amount due thereon, and in good faith attempted to comply with his obligation and to protect her rights by the transfer of personal property. The undisputed evidence tending to show the absence of fraud and the validity of the transfer is not overcome by the inferences arising from the relationship of the parties, from the claims of plaintiffs, and from the other circumstances calling for judicial scrutiny.

It follows that the decree, in so far as it invalidates the bill of sale and makes Margaret Worden liable to plaintiffs for individual debts of her son, Sherman D. Worden, is reversed, with a direction to the district court to enter a judgment conforming to the views here expressed.

REVERSED.

SEDGWICK, J., not sitting.

ANNIE E. AMSPOKER, APPELLEE, v. SAMUEL D. AMSPOKER,
APPELLANT.

FILED DECEMBER 3, 1915. No. 18460.

Husband and Wife: SEPARATION: AGREEMENT AS TO PROPERTY RIGHTS: ENFORCEMENT. Where a husband and his wife are permanently separated, and the latter has legal grounds for a divorce, they may agree upon a settlement of their property rights, and provide by contract for the support and maintenance of the wife, and if the provisions are fair and reasonable the agreement may be enforced by the courts.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed as modified.*

H. N. Mattley and W. T. Stevens, for appellant.

L. C. Burr and R. J. Greene, contra.

ROSE, J.

Plaintiff, who was formerly the wife of defendant, brought this action against him to recover \$2,800 on a contract recognizing an existing separation and providing for the adjustment of their property rights. In a former suit, instituted by her after the execution of the contract, she procured a divorce without alimony. The husband, according to the terms of the contract mentioned, agreed to transfer to his wife a house and lot in Lincoln, the household property in her possession, and two shares of stock in a building and loan association. He permitted her to retain a similar share of stock standing in her own name. He promised to pay her existing doctor and hospital bills, and the costs of a suit by her for a divorce and an attorney's fee of \$50 for prosecuting it. In addition, he agreed to pay her for support and maintenance \$3,000 in monthly installments of \$50 each. The wife, on her part, agreed to convey to her husband her interest in a lot in Lincoln, Nebraska, and in a lot in Pecos, Texas. She also agreed, upon her husband's performance of all the terms of his agreement, not to demand alimony in any action against him for a divorce. Defendant admitted the execution and delivery of the contract, but pleaded that it was procured by duress, that its terms were unconscionable, and that it was void as being contrary to public policy. Upon a trial of the issues, the district court rendered a judgment in favor of plaintiff for the unpaid installments and interest, computed to be \$3,246.50. Defendant appealed.

Plaintiff performed the contract on her part. Defendant complied with his agreements, except that he refused to pay the monthly installments after having paid them

for eight months. The defense of duress was not proved. The evidence does not justify a finding that the burdens assumed by defendant were unconscionable. The appeal, therefore, presents these questions: Is the contract void as collusive? Is it void as facilitating a divorce in violation of public policy?

On the part of plaintiff there was no occasion for collusion. The evidence shows beyond question that the parties were not living together as man and wife when the contract was executed, that plaintiff then had more than one legal ground for a divorce, that she was entitled to reasonable alimony, that marital relations were never resumed, and that a divorce was promptly granted to her. Under such circumstances the law in the states of this country, with one or two exceptions, is that reasonable agreements confined to the adjustment of property rights are binding on the parties and may be enforced by the courts. Cases announcing this rule and giving the reasons on which it rests are collected in a note, in 12 L. R. A. n. s. 848, to *Hill v. Hill*, 74 N. H. 288.

It is argued, nevertheless, that the contract, in requiring defendant to pay the costs of a divorce suit and an attorney's fee for prosecuting it, indicates collusion and an unlawful purpose to facilitate the procuring of a divorce. This position is untenable for the following reasons: Plaintiff's right to a divorce on legal grounds was free from doubt. Her right to reasonable alimony was equally clear. A court, upon a proper showing, would have required defendant to pay the costs of a divorce suit and the fee of an attorney for prosecuting it. In mutually settling property rights during a permanent separation, defendant lawfully assumed such burdens. The contract did not require plaintiff to commence a suit for a divorce, and, if brought, defendant was left free to make a defense. The circumstances surrounding the transactions and the language used in the written instrument do not require a construction which would invalidate the contract. It fol-

lows that the trial court did not err in refusing to cancel it on these grounds.

Defendant further argues that collusion and an unlawful purpose to facilitate the procuring of a divorce are shown by the evidence. This contention is based largely on testimony of the attorney who drew the contract. It may be inferred from what he said about his recollection of the circumstances that a divorce was contemplated, and that he did not deliver the contract or the conveyances until after the decree of divorce had been entered. The parties did not meet and agree on all of the terms. Plaintiff had furnished to and had left with an attorney, who acted for both, data indicating the provisions to which she was willing to subscribe. Later each of the parties went to the office of the attorney at a different time and signed the instrument prepared by him. When all of the evidence is considered, any inference of collusion or of an illegal purpose to facilitate the granting of a divorce should be attributed to defendant. Such a purpose was not a part of the mutual understanding of the parties. In this view of the record, the contract does not violate the doctrine invoked by defendant and announced in *Wilde v. Wilde*, 37 Neb. 891, and *Davis v. Hinman*, 73 Neb. 850.

The judgment, however, is excessive. Defendant seems to concede that the amount due plaintiff under the contract, if valid, was \$2,698.58, when the judgment was rendered. It is clear that plaintiff is not entitled to a greater recovery. The judgment will therefore be reduced to that sum, and, as thus modified, will be affirmed at the costs of defendant.

AFFIRMED AS MODIFIED.

LETTON, J., not sitting.

WEEKES GRAIN & LIVE STOCK COMPANY ET AL., APPELLANTS, v. WARE & LELAND, APPELLEES.

FILED DECEMBER 3, 1915. No. 18486.

1. **Corporations: FORFEITURE OF CHARTER: RIGHT TO SUE.** "After the charter of a corporation has been forfeited, under the act of 1909, for nonpayment of the occupation fee, an action cannot be prosecuted in the corporate name. Laws 1909, ch. 25." *Havens & Co. v. Colonial Apartment House Co.*, 97 Neb. 639.
2. ———: ———: ———: **AMENDMENT OF PETITION: PARTIES.** A mistake in beginning an action in the name of a domestic corporation after its charter has been forfeited for nonpayment of an occupation fee may be corrected by an amended petition showing that the managing officers or directors, as trustees, are plaintiffs.

APPEAL from the district court for Douglas county:
GEORGE A. DAY, JUDGE. *Reversed.*

Sutton, McKenzie, Cox & Harris, for appellants.

Smyth, Smith & Schall and *William A. Bowles*, contra.

ROSE, J.

This action was instituted by the Weekes Grain & Live Stock Company, plaintiff, to recover from defendants damages in the sum of \$23,062.50 for breach of a contract of agency. Plaintiff was a domestic corporation, and filed its petition in its corporate name after its charter had been forfeited for nonpayment of the occupation fee imposed by statute. Laws 1909, ch. 25. Later William B. Weekes and Edgar T. Weekes, as managing officers, attempted to become plaintiffs by means of an amended petition containing, in addition to the facts originally pleaded, allegations that: "The charter of the Weekes Grain & Live Stock Company was forfeited under and by virtue of the laws of the state of Nebraska for the nonpayment of the corporation tax; that the debt and obligation herein sued on accrued to the said corporation prior to

the dissolution of the same; that this action is brought by the Weekes Grain & Live Stock Company, a dissolved corporation, for the purpose of winding up its affairs, and by the plaintiffs, William B. Weekes and Edgar T. Weekes, as the managing officers of said corporation at the time its charter was forfeited for the nonpayment of said corporation tax." On objections to jurisdiction, the trial court held that the action was not maintainable in the name of the corporation, and that its managing officers could not be made plaintiffs by amending its petition. A dismissal followed, and the managing officers have appealed.

In holding that the corporation was without capacity to sue, after the forfeiture of its charter, the trial court observed the following rule: "After the charter of a corporation has been forfeited, under the act of 1909, for nonpayment of the occupation fee, an action cannot be prosecuted in the corporate name. Laws 1909, ch. 25." *Havens & Co. v. Colonial Apartment House Co.*, 97 Neb. 639.

This is a harsh, technical rule resulting from a forfeiture made imperative by legislation as judicially construed. The statute makes a distinction between a corporation forfeiting its charter for nonpayment of a fee and other corporations abandoning or losing a charter for other reasons. The latter may sue in the corporate name after dissolution. Rev. St. 1913, sec. 555. *Schmitt & Bro. Co. v. Mahoney*, 60 Neb. 20. When the present suit was brought, the rule quoted had not been adopted. Who should be plaintiff in such a case was then a doubtful question. In any event the relief sought is the same. Defendants are called to answer for the same liability, whoever is plaintiff. In such a situation a rule preventing the managing officers from becoming plaintiffs by amendment, after defendants have appeared in response to a summons issued on a petition drawn and filed in the corporate name, should not be adopted unless demanded by the law.

Defendants justify the dismissal on the grounds that the proceedings instituted by the dissolved corporation are void and that therefore the petition is not amendable. It must be conceded that the argument in favor of these propositions is formidable, and that the position taken is not without support in adjudicated cases. The determination of the question, however, depends upon the proper interpretation of the Code as applied to the facts pleaded in the amended petition. The code provides: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party or by correcting a mistake in the name of the party, or a mistake in any other respect or by inserting other allegations material to the case." Rev. St. 1913, sec. 7712.

Defendants argue that this section does not authorize an amendment substituting a new plaintiff, where the action was commenced in the name of a dissolved corporation. Among the cases sustaining the position thus taken is *Proprietors of the Mexican Mill v. Yellow Jacket Silver Mining Co.*, 4 Nev. 40. There the plaintiffs were styled: "The plaintiffs, the proprietors of the Mexican Mill, a copartnership, doing business in that name in the county of Ormsby, state of Nevada." The Nevada statute relating to amendments was similar to that quoted. Leave to amend was denied, the court saying: "The very first step towards the commencement of a civil action or proceeding is the filing of a complaint, in which it is indispensable that there be shown a plaintiff and a defendant, and without which it is an absolute nullity, and renders void all subsequent proceedings had under it. In this instance no person, natural or artificial, is named as plaintiff; and if an amendment were allowed to supply the omission the effect of such amendment would necessarily be to make a plaintiff where there was none such at the inception of the action."

A more liberal interpretation, however, was adopted in *Omaha Furniture & Carpet Co. v. Meyer*, 80 Neb. 769. Henry J. Abrahams was doing business under the name of "Omaha Furniture & Carpet Company" and commenced an action in his trade name. An amendment was allowed substituting "Henry J. Abrahams" as plaintiff. This was held proper under the statute quoted.

Under a similar Kansas statute it was held proper to permit a petition, filed in the name of a dissolved corporation by its sole manager, to be amended to show the dissolution of the corporation and the substitution of the managing director as plaintiff. *Paola Town Co. v. Krutz*, 22 Kan. 725. In the case last cited the supreme court of Kansas said: "The only question remaining is whether the district court committed error in permitting the amended petition to be filed. We think not. Section 139 of the Code evidently contemplates all such amendments as are clearly in furtherance of justice, and consistent with the rights of all parties interested. The theory of our system of practice under the Code is founded upon the leading idea that the action once pending shall not be permitted to fail, if by amendment any defects or omissions in the pleading can be remedied."

The views thus announced are in harmony with expressions of opinion in cases cited by Judge Brewer in *Hanlin v. Baxter*, 20 Kan. 134. The conclusion of the supreme court of Kansas seems to be warranted by the letter and spirit of the Code, though the court commission, in *Wearer v. Young*, 37 Kan. 70, appears to have had some misgiving on the subject, as indicated by the following language found in the report of that case: "We must confess that, if this question were now presented to the court for the first time, we would have great difficulty in controlling the argument, and resisting the authorities cited by counsel for the plaintiff in error. The line of decision heretofore made by the court on this question is broad

enough to embrace the amendment made in this case, and there is no error in the district court permitting it."

This doubt does not appear to be shared by the supreme court of Kansas. In *Service v. Farmington Savings Bank*, 62 Kan. 857, it was said: "Great latitude is given to the trial court in the matter of the amendment of pleadings, with a view of curing defects, supplying omissions, and preventing injustice. Our statute in terms authorizes the adding or striking out of the name of any party or correcting a mistake in the name of a party, or a mistake in any respect. * * * While it is a radical amendment to substitute one plaintiff for another, such an amendment is clearly within the power of the court, under the plain provisions of the Code, and *Weaver v. Young*, 37 Kan. 70, is directly in point and settles the question in favor of the substitution. * * * Cases are cited from other states holding adversely to such amendments, but our statute and the cases interpreting it completely cover the present action, and a review of other cases, based on other statutes, would be without profit."

The proceedings are not void in the sense that the petition cannot be amended to allow the proper parties to maintain the action. For the reasons stated, the amendment should have been allowed. Complaint is made because the title does not show that the new plaintiffs are managing directors and trustees of the dissolved corporation, but this is an amendable defect. *Paola Town Co. v. Krutz*, 22 Kan. 725.

For the error pointed out, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

OMAHA NATIONAL BANK, APPELLEE, v. SMITH F. FERGUSON, EXECUTOR, ET AL., APPELLANTS.

FILED DECEMBER 3, 1915. No. 13357.

Mortgages: FORECLOSURE: SALE: CONFIRMATION: COLLATERAL ATTACK. It is the settled law of this state that an order of sale, a sale, and a confirmation of the sale, made after the death of a party to a foreclosure suit, subsequent to the decree, are impervious to collateral attack. *Jennings v. Simpson*, 12 Neb. 558, and *McCormick v. Pad-dock*, 20 Neb. 486, reaffirmed.

APPEAL from the district court for Sarpy county: HARVEY D. TRAVIS, JUDGE. *Reversed and dismissed.*

W. J. Connell, for appellants.

Ellery H. Westerfield and Raymond M. Crossman, contra.

FAWCETT, J.

The question involved on this appeal is one of law; no controverted question of fact being presented by the record. The facts, briefly stated, are: On November 3, 1888, Charles Childs executed and delivered to the Omaha Loan & Trust Company his promissory note for \$8,000. As security therefor he and his wife, Catherine J., executed and delivered to the trust company a mortgage deed covering lands in sections 15, 22 and 23, in township 14, range 13, in Sarpy county, which note and mortgage were, on February 23, 1895, duly assigned to Everard D. Ferguson. Thereafter Ferguson brought suit in the district court for Sarpy county to foreclose such mortgage. December 4, 1900, a decree of foreclosure was entered. February 26, 1901, plaintiff in this suit obtained a judgment in the district court for Douglas county against Charles Childs. January 4, 1903, Charles Childs died, intestate, as we infer from the record, leaving as his heirs at law his children, Harriet M., Susan I., Lowrie and Caroline. An

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appeal, which had been taken from the decree of foreclosure entered December 4, 1900, was argued and submitted to this court on December 2, 1902, and on January 21, 1903, the decree of the district court was affirmed. *Childs v. Ferguson*, 4 Neb. (Unof.) 65. March 17, 1903, the death of Charles Childs having been suggested, an order was entered in this court recalling the mandate theretofore issued. The judgment of affirmance was amended, and a judgment *nunc pro tunc* as of the date when the cause was submitted, to wit, December 2, 1902, was duly entered and mandate issued. June 15, 1903, Ferguson, plaintiff in the foreclosure suit, obtained an order of sale directed to the sheriff of Sarpy county. July 20, 1903, the property was sold by the sheriff to the plaintiff, Everard D. Ferguson, for \$16,600. August 4, 1903, an order of confirmation of such sale was entered, and thereafter a deed was duly issued to the purchaser at such sale. Notice of the motion to confirm the sale was duly served upon the attorney of record of the defendants in the foreclosure suit and upon E. S. Park, administrator of the estate of Charles Childs, deceased. Susan I. Childs, a daughter and one of the heirs of Charles Childs, deceased, intervened and filed written objections to the confirmation of the sale. So far as this record shows, no other objections were filed. The objections filed by Susan I. Childs were overruled and an order of confirmation entered. From this order no appeal was prosecuted. December 8, 1905, plaintiff in this suit had execution issued on its judgment in Douglas county, which execution was returned *nulla bona*. Everard D. Ferguson died testate September 8, 1906, and defendant Smith F. Ferguson was appointed executor. January 19, 1908, plaintiff obtained in the district court for Douglas county a final order of revivor, reviving its judgment against the heirs at law of Charles Childs, to wit, Harriet M., Susan I., Lowrie and Caroline. On or about April 28, 1908, plaintiff obtained a transcript of its original judgment from the clerk of the district court for Douglas county, and on April 30, 1908, filed the same with the

clerk of the district court for Sarpy county, and on January 6, 1910, instituted the present suit in Sarpy county. April 12, 1913, an amended petition was filed, upon which, together with the answer thereto and the reply to such answer, the cause was tried. Plaintiff's prayer for relief is that the sale and the order confirming the same and the deed issued pursuant thereto in the foreclosure suit be adjudged to be null and void and vacated; that an accounting be had of the rents and profits and other credits, if any, received by Everard D. Ferguson, or his executor; that the amount due the executor be found and held to be a first lien upon the land, and plaintiff's judgment a second lien thereon; that the lands be sold and the proceeds be applied, first, to the payment of costs; second, to satisfy the lien of the executor; third, to satisfy the plaintiff's judgment; and that the balance be paid to the heirs of Charles Childs, deceased. The district court found for the plaintiff and entered a decree in accordance with the prayer of its petition. Defendants appeal.

The question of law to be determined is: Did the fact that Charles Childs died after the entry of the decree in the foreclosure suit, and that no order of revivor was entered prior to the issuance of the order of sale and proceedings had thereunder, render such proceedings null and void? The district court so held. In so holding the court erred.

Plaintiff cites *Vogt v. Daily*, 70 Neb. 812, *Street v. Smith*, 75 Neb. 434, *Wardrobe v. Leonard*, 78 Neb. 531, and *Seeley v. Johnson*, 61 Kan. 337, to support its contention that, "Where a judgment or decree has been rendered, and thereafter a party to the judgment dies, the judgment or decree is unenforceable by execution or judicial sale without revival as to the representatives of the deceased party to the judgment or decree." *Wardrobe v. Leonard*, *supra*, is an authority against this contention. In that case *Vogt v. Daily*, *Street v. Smith* and *Seeley v. Johnson*, *supra*, are all three considered, and the rule announced:

"A decree in a foreclosure proceeding entered after the death of the plaintiff, occurring subsequently to the time that the jurisdiction of the court had attached, is an irregularity not open to collateral attack." Our holding in *Wardrobe v. Leonard*, *supra*, is clearly in line with the earlier cases decided in this court and with the construction that has been put upon those decisions by the circuit court of appeals of the eighth circuit, and also by the supreme court of the United States. In *Jennings v. Simpson*, 12 Neb. 558, we held: "A judgment rendered against a person—and equally so of one rendered in his favor—after his death is reversible, if the fact and time of death appear on the record, or in error *coram nobis*, if the fact must be shown *aliunde*; it is voidable, and not void, and cannot be impeached collaterally. *Yaple v. Titus*, 41 Pa. St. 195." In *McCormick v. Paddock*, 20 Neb. 486, *Jennings v. Simpson*, *supra*, is cited, and the paragraph of syllabus therein which we have above quoted is repeated, and the doctrine adhered to.

After the death of their father, Susan I. and Harriet M. Childs challenged the validity of the order of confirmation in the foreclosure suit, and the executor filed a bill in the United States circuit court for the district of Nebraska for a writ of assistance to place him in possession of the homestead which the two daughters named had occupied with their father before his death, and which they were still holding and claimed the right to continue to hold, on the ground that Charles Childs died before the decree of foreclosure was filed or entered and before the sale thereunder was made, and that the suit had never been revived. The circuit court granted the writ, and the case was taken to the circuit court of appeals for the eighth circuit, where the judgment of the circuit court was affirmed. *Childs v. Ferguson*, 181 Fed. 795. Opinion by Sanborn, circuit judge. In the fourth paragraph of the syllabus it is held: "It was the settled law of Nebraska, when certain mortgages were made, that an order of sale, a sale, and a confirmation of the sale, made after the death

of the party to a suit in equity, subsequent to the decree, were impervious to collateral attack." In the opinion, *Vogt v. Daily*, *Street v. Smith*, and *Seeley v. Johnson*, *supra*, are all considered. In the opinion (p. 797) it is said: "In the case at bar the sale under the decree was made and confirmed without a revivor. No appeal was taken from the order of confirmation of the sale, no motion or petition to avoid it was made, and it is not now directly, but is collaterally, assailed. In *McCormick v. Paddock*, 20 Neb. 486, the supreme court of that state held that an order of confirmation of a sale under a decree made after the death of a party whose interest in the subject matter passed to another by her death, and the decree itself, were voidable, but not void, and that they were impervious to collateral attack, although there had been no revivor; and it cited in support of this conclusion its prior decision to a like effect in *Jennings v. Simpson*, 12 Neb. 558. In the year 1894, in the case of *Harter v. Twohig*, 158 U. S. 448, 454, 15 Sup. Ct. Rep. 883, 39 L. Ed. 1049, the supreme court of the United States cited these cases, and declared that this was the settled law in Nebraska." On page 798 it is said: "When a mortgagor dies after he has appeared, answered, presented his evidence and arguments, and the court has decided his case and ordered a sale of the mortgaged property to satisfy the liens the mortgages evidence, those who acquire his property by his death take it subject to that decision and to those liens. If the mortgagor conveys his title and interest, it is unnecessary to make his grantee a party to the suit, or to notify him of the decree or the subsequent proceedings to apply the land to the payment of the liens; and why should one to whom the title passes by descent without consideration have greater rights than one to whom it goes by purchase?" In like manner it may be said: And why should plaintiff who had a claim against the decedent under a judgment in another county, which was in no sense a lien upon the land of the decedent, and did not become a lien upon the land after it had passed to his heirs until nearly five years after the

proceedings complained of had been had in the foreclosure suit, and who for over five years after the death of its judgment debtor failed to file any claim in the probate court of the county where the estate of such debtor was being settled, have greater rights than one to whom the estate might go by purchase? It is entirely clear that, if at any time during the more than five years which elapsed between the death of Charles Childs and the filing of the plaintiff's transcript of its Douglas county judgment in the district court for Sarpy county, the heirs of Mr. Childs had all sold and conveyed their property, plaintiff's transcript, so far as the property in controversy is concerned, would have been of no force and effect. The purchaser from the heirs would have taken a perfect title as against plaintiff's present claim under its judgment. What difference is there between such a situation and this? In the cited case the heirs would have disposed of their entire interest in the estate by deed prior to the filing of the transcript. In this case they had been foreclosed of their entire interest in the estate by the confirmation of the sale under the decree of foreclosure, from which they prosecuted no appeal, and which they have never in any manner attempted to assail by a direct attack. *Harter v. Twohig*, 158 U. S. 448, cited by Judge Sanborn, was an appeal from the circuit court of the United States for the district of Nebraska. That case was a much stronger one than this. In that case the holder of a trust deed placed the deed and the notes secured thereby in the hands of his attorney for foreclosure, and verified a petition drawn for that purpose. The petition was filed seven days later, but one day after the plaintiff in that suit had died. The case proceeded to final decree, sale and deed, without, so far as the record shows, anyone becoming advised of the death of Mr. Harter. A number of years later Twohig learned of the condition of affairs, and proceeded to obtain quitclaim deeds from the original owners of the fee. He then brought suit to have the decree in favor of Harter and the sheriff's deed based thereon set aside and to be allowed to redeem the land. The

circuit court sustained his application. On appeal to the circuit court of appeals the judges were divided, and the case was thereupon certified to the supreme court. The supreme court reversed the cause and remanded it, with directions to dismiss Twohig's bill. On page 454 of the opinion, which is by Mr. Chief Justice Fuller, the court cite *Jennings v. Simpson*, 12 Neb. 558, and *McCormick v. Paddock*, 20 Neb. 486, and state: "It is settled law in Nebraska that a judgment rendered against a person or in his favor is reversible after his death if the fact and time of death appear upon the record, or in error *coram nobis*, if the facts must be shown *aliunde*; the judgment is voidable and not void, and cannot be impeached collaterally." We agree with this construction of our former holdings. This is the settled law in Nebraska. *Street v. Smith*, *supra*, was a direct attack by appeal in the same case from the order of confirmation of the sale; hence it is not an authority in this case. In *Vogt v. Daily*, *supra*, the judgments were entered in justice court. No transcripts were ever filed in the district court; the executions being issued by the justice many months after the death of the judgment creditor. The distinction between that case and the one at bar is obvious. In that case no lien on either real or personal property had attached at the time of the death of the judgment creditor. In the case at bar both the mortgage and the decree of foreclosure were liens on the real estate and the decree ordering its sale had been entered before the mortgagor (the defendant in the foreclosure suit) died. The mere statement of the difference in the two cases is sufficient to show that that case is not an authority in this.

The judgment of the district court is therefore reversed, and the suit dismissed at plaintiff's costs.

REVERSED AND DISMISSED.

LETTON, J., not sitting.

GEORGE L. COON, APPELLEE, v. DRAINAGE DISTRICT No. 1,
RICHARDSON COUNTY, APPELLANT.

FILED DECEMBER 23, 1915. No. 18193.

New Trial: NEWLY DISCOVERED EVIDENCE. A motion for a new trial on the grounds of newly discovered evidence will be sustained when the showing made in support thereof tends strongly to show that evidence materially affecting the amount of recovery, given by the prevailing party, on a point not suggested by the pleadings, was untrue, and the defeated party might not reasonably have anticipated the same and controverted it on the trial, and the showing made would require a different verdict.

APPEAL from the district court for Richardson county:
JOHN B. RAPER, JUDGE. *Reversed.*

Kelligar & Ferneau and *A. R. Keim*, for appellant.

C. F. Reavis, contra.

MORRISSEY, C. J.

Drainage district No. 1, of Richardson county, instituted *ad quod damnum* proceedings in the county court, and appraisers were duly appointed. They made an award of damages of \$676. The owner of the land prosecuted an appeal to the district court, but filed no petition, and trial was had upon the issues made by the transcript, the answer and the reply. The tract of land through which this right of way was taken comprised approximately 45 acres, and the drainage district, by way of answer, set up that the total benefits to the tract, as adjudged by its board of supervisors was the sum of \$1,890, that the apportionment of costs for the construction of the drainage canal was \$710.57, and asked that the net difference, to wit, \$1,179.43, be offset against any consequential damages which might be due the property owner; also that, at the request of the property owner, the location of the ditch had been changed, and he was therefore estopped from claiming any damages.

The reply admitted the amount of the benefits and the apportionment of costs of construction, alleged that the canal was not built in accordance with the report of the engineer and the plans and specifications adopted by the drainage district; that it was not constructed on the line of survey, nor was the canal of the width and depth called for by the plans and specifications; that the drainage district accepted the canal, although it is entirely different as to location, width and depth from the plans and specifications adopted and on which the benefits to the land were fixed and determined. There was a prayer for consequential damages caused by the construction of the ditch, as well as all actual damages, and that the drainage district be denied the right to set-off as prayed in its answer.

The jury returned a general verdict in favor of plaintiff in the sum of \$1,132.57, and also made answer to four special interrogatories, finding: First, that the value of the land taken was \$312; second, that the amount of consequential damage was \$2,000; third, that the ditch differed materially from the ditch provided by the plans and specifications; fourth, that the changes were not made with the consent of plaintiff. Judgment was entered on the verdict, and the drainage district has appealed, relying upon three principal assignments of error. First, because the court submitted interrogatory 3, to wit: "Does the ditch, as constructed through the Coon land, differ materially from the ditch provided by the plans, specifications, and maps adopted by the drainage board?" To this interrogatory the jury returned an affirmative answer. Defendant now complains that this presented to the jury a question not properly triable in *ad quod damnum* proceedings. It is true that the appeal could bring to the district court for decision by the jury only the questions that were covered by the award, but defendant, by its answer, injected this issue into the record. The question may have been entirely foreign to the real issue, but in the instructions the court did not permit the jury to take this into con-

Coon v. Drainage District.

sideration in arriving at the amount of their verdict, and we are inclined to take the view, contended for by plaintiff, that interrogatories 3 and 4 were submitted by the court to meet the question of estoppel which defendant itself raised by its answer. As we do not see that defendant was in any sense prejudiced by the submission of these interrogatories, it is unnecessary to discuss them further.

The second assignment complains of the admission of testimony showing the sum paid for the bridge constructed over the ditch. By the construction of this canal the land was divided, leaving about five acres upon one side and about 35 acres on the other. Plaintiff testified that it was necessary to have a bridge; and, over the objection of defendant, he was permitted to testify that the bridge cost \$1,250. This was followed by the testimony of the bridge builder, who testified that he "got \$1,250." The better course would be to show the necessity for its construction, that competent men were engaged to build it, and then show its cost. But the assignment directed against the ruling on the motion for a new trial presents a more serious question. A number of witnesses testified as to the value of the land both before and after the appropriation and construction of the canal. Plaintiff testified that the land prior to the construction of the ditch was worth \$80 an acre, but after the construction it was worth \$30. A number of witnesses corroborated him, while farmers and landowners in the immediate neighborhood placed the value at from \$25 to \$45 before the ditch was constructed and at \$50 to \$75 after its construction. The answer to interrogatory 2 fixed the value of the land taken at \$65 an acre.

Plaintiff did not become the owner of the land until after these proceedings were commenced, but had been the agent of the owner, and testified that for several years immediately preceding the institution of these proceedings the land had yielded as a net income to the owner \$9.35 an acre. This testimony having been admitted over ob-

jection, on cross-examination a hypothetical question was submitted to a number of defendant's witnesses, and they were required to place a valuation on the land based upon the supposition that it had returned the revenue testified to by plaintiff. In this way a valuation was fixed on this assumed income. At the time plaintiff claimed the land returned a net income of \$9.35 an acre, it was owned by a non-resident blind woman. After the trial counsel located this woman, and secured and filed, in support of a motion for a new trial, her affidavit, with others, contradicting the testimony of plaintiff, showing that some years she received little, if any, rent, as the crops were destroyed by flood, and that she sold the land after these proceedings were instituted for \$1,200.

There was no allegation in the pleadings as to the productiveness of the land, and defendant could not have anticipated that plaintiff would testify to a rental value so greatly in excess of what the former owner says it was. Mrs. Mullins has no interest in the litigation, and there appears to be no reason to doubt the truthfulness of her statements. Her sale of the land, after these proceedings were instituted, for \$1,200 is a circumstance corroborative of her statement, and tends very strongly to disprove the testimony of plaintiff. We cannot believe that she would have sold the land for approximately \$27 an acre if her returns therefrom were as great as testified to by the plaintiff. Defendant was bound to anticipate every legitimate claim that might be made by plaintiff under the pleadings, but cannot be charged with a lack of diligence in failing to anticipate the testimony of plaintiff as to rentals.

After deducting the acreage actually taken, there were approximately 40 acres to which consequential damages could attach, and by making an award of \$2,000, the jury allowed \$50 an acre, which is an unreasonable allowance under any view taken of the evidence.

The legitimate effect of the evidence offered in support of the motion for a new trial would be to require a differ-

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ent verdict, and, as we find no lack of diligence on the part of the defendant, the judgment of the district court is reversed and the cause remanded.

REVERSED.

HAMER, J., not sitting.

NEWARK TOWNSHIP, APPELLANT, v. KEARNEY COUNTY,
APPELLEE.

FILED DECEMBER 23, 1915. No. 18319.

Paupers: LIABILITY OF COUNTY. A resident of Kearney county became sick and destitute in Newark township, of that county. He was without property or means of any kind, but had living within the county an able-bodied, unmarried son, employed as a farm hand, and the owner of unincumbered real estate worth more than \$1,000. Without calling upon the son to provide for his father, and without any authority from the county board to create an obligation against the county, plaintiff township expended money for his board and hospital fees. In an action against the county to recover the amount expended, *held* that the county is not liable.

APPEAL from the district court for Kearney county:
HARRY S. DUNGAN, JUDGE. *Affirmed.*

Lewis C. Paulson, for appellant.

Charles A. Chappell, contra.

MORRISSEY, C. J.

Action to recover from defendant \$223 paid by plaintiff for board, nursing and hospital fees for John Peebles, a pauper. A jury was waived and the cause tried to the court, with finding and judgment in favor of defendant.

Plaintiff alleges that Peebles was a nonresident of the county. It appears to be conceded that there can be no recovery unless the pauper's nonresidence is established. A number of defenses are set out; among others, a denial of the nonresidence of Peebles; also that he had a son within the county who was liable for his support. Testimony on the question of residence was offered by each

party, but the record does not disclose what conclusion the court reached; it having entered a general finding for the defendant. On this branch of the case, the testimony shows that Peebles settled in the county at a very early day, and had a homestead there. Twenty years or more before the trial he and his wife separated. They had two children, a son and a daughter. The daughter married and removed to a distant county, but the son, with the exception of a short absence, continued to live in Kearney county. He appears to be an able-bodied farm hand, or laborer, and the owner of a small house in the city of Minden, worth more than \$1,000. A part of each year his mother lived with him, and the remainder of the time she worked for wages. Peebles drifted around the country more or less, but when so minded, made his home at his son's house. A year before plaintiff furnished this assistance the old gentleman was living at the son's house, while it appears the wife and son were away, and Hayes township, the township in which this house was located, treated him as a pauper and furnished him aid from October 19, 1910, to July 5, 1911. On the latter date he was induced to go to Iowa, which he testifies was for the purpose of making a visit. He returned to Kearney county early in December, 1911, and went into the plaintiff township, where his son was employed as a farm hand. Being sick and in destitute circumstances, the officers of the township took charge of him and expended the money for which the suit is brought.

The son testified that he owned a house in the city of Minden, and for the past three years made that his home, and that his father had been "there a short time at spells," and came and went as he pleased, and whenever he wanted to come back he did so.

The gentleman who took care of Peebles during the time he was supported by Hayes township testifies that during this period the old gentleman lived in the son's house in the city of Minden, which is the county seat of Kearney county; that the witness advised him to go to Iowa, telling

him that if he remained in Minden he might be committed to the asylum for the insane; that he furnished him the money to defray his expense and was reimbursed by Hayes township.

The old gentleman testified that he was about 73 years of age; that he went to Iowa "to make a visit;" that he had no property; that for the past five or six years "I was mostly with the boy on the place and here in Minden, and I stayed here awhile, and after I came back I was sick, you know, and I had to stay in the house; they helped me, I stayed there and batched, and they had this man come there and look after me." In answer to the question where he had lived for the last four or five years he answered: "Oh, around mostly with the boy. * * * Yes, sir; I made my home with him all the time since the last few years lately, and then I had to go to the hospital." "Q. Your home was with your son? A. Yes, sir." It is evident that he looked upon his son's house as his home. The son testified that it had been open to the father, and that he might come and go at will.

The cause was tried on the theory that, if Peebles were a resident of Kearney county, plaintiff could not recover. The testimony is sufficient to warrant the conclusion that he was a resident of that county.

The county was under the township organization, and, as a poorhouse had not been established, the justice of the peace was *ex officio* overseer of the poor. As said by Mr. Justice Cobb in *Waltham v. Town of Mullaly*, 27 Neb. 483: "The law for the government of towns in those counties where the system of township organization has been adopted is far from perfect, or comprehensive in its provisions."

Section 4543, Ann. St. 1911, provides: "The electors present at the annual town meeting shall have power * * * to direct the raising of money by taxation * * * for the support of the poor within the town; provided, that when the county board of any county shall have established a poorhouse under any statute law of this

state, the support of the poor shall be provided for by the county board, and no taxes for that purpose shall be voted by the electors at town meetings except sufficient to provide temporary relief." Sections 9750, 9751, Ann. St. 1911, make it the duty of the children, where able, to support the dependent parents.

"A person is chargeable as a pauper under the statute, when he is without means, and unable, on account of some bodily or mental infirmity, or other unavoidable cause, to earn a livelihood, and has no kindred in the state liable under the statute for his support, or whose kindred within the state are of insufficient ability or fail or refuse to maintain him." *Otoe County v. Lancaster County*, 78 Neb. 517. This man had an able-bodied, unmarried son, 26 years of age, with unincumbered property worth over \$1,000. He had constant employment, and was surely liable for the support of his father, but no demand was made upon him.

It is said in appellant's brief, although not shown in the record, that the trial court, in rendering its opinion, held that the payments made by plaintiff were voluntary, and for that reason it could not recover. As against defendant county this is certainly true. Before any obligations were incurred the county attorney was consulted by the justice of the peace, and was advised that the county would not reimburse the township. The county board was never asked to audit the claims of those actually caring for the old gentleman. These claims were paid by the township without a request for aid being made to the county board. A somewhat similar question was presented in *Hamilton County v. Meyers*, 23 Neb. 718, where a physician attended a nonresident pauper, and afterwards filed his claim against the county, and it was held that the county was not liable.

The record being free from error, the judgment is

AFFIRMED.

FAWCETT and HAMER, JJ., not sitting.

State, ex rel. Chamberlin, v. Morehead.

STATE, EX REL. WALTER CHAMBERLIN ET AL., APPELLEES, V.
JOHN H. MOREHEAD ET AL., APPELLANTS.

FILED DECEMBER 23, 1915. No. 19406.

Banks and Banking: SAVINGS BANK: CHARTER: DISCRETION. Article I, ch. 6, Rev. St. 1913, the Nebraska banking act, construed, and held to vest the banking board with discretionary power to refuse a charter for a savings bank when it appears that the proposed bank is to be conducted in the same room, or in a room immediately adjacent to a room, occupied by a national bank, and the officers and directors of the two banks will be substantially the same persons.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Reversed and dismissed.*

Willis E. Reed, Attorney General, and Charles S. Roe,
for appellants.

W. T. Thompson, contra.

MORRISSEY, C. J.

Relators made application to the state banking board for a charter for a savings bank, to be known as the State Savings Bank of Clarks, Nebraska. The preliminary steps provided by the statute were taken in due form, and no objection was raised as to the character of the parties, their financial ability, or the form of the application, but the banking board ascertained that, if the charter were granted the relators intended to conduct the business of the state savings bank in the same room, or in a room immediately adjacent to the room, occupied by the First National Bank of Clarks, and that the officers and directors of the two banks would be the same persons, or practically so. Some time preceding this application, the banking board had before it a similar application, which it rejected, after adopting a resolution declaring it unwise, unsafe, and against public policy to permit the operation of banks as relators proposed, and declaring it the fixed

policy of the board that, in the future, charters under such circumstances would not be granted. On consideration of relators' application the board adhered to its policy theretofore announced and refused to issue a charter.

This action was then commenced in the district court for Lancaster county, and, on hearing, a writ of mandamus issued directing respondents to forthwith convene, approve the articles of incorporation, and issue the charter as prayed. Respondents have appealed. No question of fact is in dispute. But we are called upon to determine whether the board had discretionary power to refuse to grant the charter under the provisions of the banking act.

By the Nebraska banking act, article I, ch. 6, Rev. St. 1913, banking is declared to be a quasi-public business, subject to regulation and control by the state, and it is made unlawful to engage in this business, except by means of a corporation duly organized for that purpose. The act creates a banking board, giving it general supervision and control of all banks coming within its provisions. It is made the duty of the governor to appoint a secretary for the board, and examiners, who are empowered "to make a thorough examination into all the books, papers and affairs of any corporation transacting a banking business in this state." Section 8. These examiners are empowered to summon witnesses and administer oaths, and it is made their duty to make a detailed report to the banking board. If, upon examination, a bank is found to be insolvent, "or is conducting its business in an unsafe or unauthorized manner, or is endangering the interest of its depositors, then such examiner shall have full power and authority to hold and retain possession of all the money, rights, credits, assets, and property of every description belonging to such bank, * * * until the state banking board can receive and act on the report made by the examiner of said bank, and have a receiver appointed as hereinafter provided." Section 10. There is further provision for the issuance of a certificate stating that the banking corporation has complied with the laws of this state for the

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protection of bank depositors, and that the depositors are protected by the depositors' guarantee fund, and that every banking corporation receiving such certificate shall conspicuously display the same in its place of business, and "may print or engrave upon its stationery words to the effect that its depositors are protected by the depositors' guarantee fund of the state of Nebraska." Section 16 provides that, after the parties have taken the preliminary steps which relators took in this case, "then the state banking board, if, upon investigation, it shall be satisfied that the parties requesting said charters are parties of integrity and responsibility, shall * * * issue to said corporation the certificate provided for in section 14 and a charter to transact the business provided for in its articles of incorporation."

Relators contend that this provision is mandatory; that, it being admitted that the parties had complied with all the terms of the act and are men of integrity and responsibility, the board has no power to inquire further into the manner or method of doing business. This is evidently the view taken by the district court, and the section, standing alone, may bear that construction. But the statute on banking is a complete and comprehensive act. It was enacted by the legislature of 1909 after it had been drafted by able lawyers, selected specially for that purpose, and after the fullest discussion and most careful research. Its purpose cannot be questioned. It aimed to take the banking business out of private hands and place it under state control, to the end that failure might be made unlikely and a general panic almost impossible. And its right to do so under the police power has been upheld by the supreme court of the United States. *Shallenberger v. First State Bank of Holstein*, 219 U. S. 114. The act provides not alone for the investigation that is to be made under section 16, before the issuance of a charter, but for a continuing supervision. Banks operated under the provisions of the act are required to carry a certain reserve, and it is provided that no part of said

reserve fund shall be kept in any depository which, in the opinion of the state banking board, would not be a proper and safe custodian thereof. The board is authorized to call upon the bank, in case its reserve falls below the proper amount, to make good the deficiency, and its failure is made cause for the appointment of a receiver. The act fixed a maximum rate of interest; two or more banks transacting business in the same city are forbidden to use the same name, or names so nearly alike as to cause confusion in transacting business, and, in case such condition did exist at the time the act became effective, the board is empowered to require such change or modification as will prevent the confusion.

Section 44 provides: "For the purpose of providing a guarantee fund for the protection of depositors in banks, every corporation engaged in the business of banking under the laws of this state shall be subject to assessment to be levied, kept, collected and applied as hereinafter provided." By subsequent provisions, the banking board is authorized to make such adjustment of rates and assessments to be paid by any bank engaging in business as will require such bank to contribute to the depositors' guarantee fund a just and equitable sum, and all banks are required to set apart, keep, and maintain the amount thus fixed and levied; the same to be payable to the state banking board on demand. It is further provided that if the depositors' guarantee fund be depleted, or reduced below a certain amount, the state banking board shall make a special assessment against the capital stock of each of the banks covered by the banking act. Section 49 provides: "Whenever it shall appear to the state banking board, from any examination or report provided for by this article, that the capital of any corporation transacting a banking business under this article is impaired, or that such corporation is conducting its business in an unsafe or unauthorized manner, or is endangering the interests of its depositors," the banking board shall proceed to secure the appointment of a receiver to

wind up its affairs. If it may do this with a bank that is a going concern, why not, before the issuance of a charter, take precautions to see that the business of the corporation will be conducted in a safe manner and that the interests of the depositors will be fully protected.

Upon the failure of any bank to pay its depositors in full, the guarantee fund, under the direction of the banking board, immediately becomes available for such purpose, and, as all of the banks operated under the jurisdiction of the banking board contribute to this fund, directly or indirectly, its conservation affects all of the depositors in these banks. Again, it may be said that when two banks are conducted in the same room, and managed by the same people, depositors may easily be mistaken as to which bank has their account. They may believe that it is deposited under the provisions of this act, while in reality their account is carried in the other bank. Again, it may complicate examinations. National banks are not subject to examination by the state examiners. State banks are not under the control of the federal government, nor subject to examination by its examiners. Experience has shown that, where the banking business is conducted as proposed by the relators, it is easy to transfer funds from one bank to another. If one of the banks finds itself in straitened circumstances, the temptation is great to draw on the other bank to tide it over an examination. Indeed, it is stipulated in the record that, in the year 1913, where a national bank and a state savings bank were conducted under conditions such as are proposed, the failure of the national bank caused the failure of the state bank with a loss to the guarantee fund in the sum of \$54,000.

If standing alone and construed literally, section 16 might bear the interpretation for which relators contend. But, in addition to the provisions already pointed out, section 60 reads: "The state banking board shall prescribe all such forms as may be useful or necessary in carrying out the provisions of this article, and shall have power to make such rules and regulations, not inconsis-

tent with the provisions of this article, as may be necessary or proper to carry it into effect according to its true intent." When the general rule of statutory construction is applied and section 16 is considered in connection with the other provisions, it must be held that the board is vested with authority not only to correct evils that may creep into the management of an existing bank, but to guard against dangers that may threaten institutions about to be formed. "The power to compel, beforehand, co-operation, and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized, if government is to do its proper work, unless we can say that the means have no reasonable relation to the end." *Noble State Bank v. Haskell*, 219 U. S. 104, 112. To give section 16 the construction asked by relators would be to narrow, if not to nullify, the provisions of the act vesting the board with power to take all steps necessary for the proper regulation of the banking business.

If the guarantee fund does not directly guarantee the deposits in the national bank, yet the fact that in the same room, or in the room adjacent, the same parties are operating a state bank under the guarantee fund, may lead the general public to believe that the money deposited in the national bank is also guaranteed. We think the intention of the legislature was to vest the banking board with general control and with authority to do all things reasonably necessary for the protection of depositors throughout the state. The board also stands in the nature of a trustee for this guarantee fund, and it is its duty to take such precautions as may be necessary to protect its integrity. The terms "general supervision and control" vest the banking board with duties of a very high order, and they are not to be perfunctorily discharged, but to be administered with the highest degree of intelligence and discretion.

It is customary for legislatures to grant to administrative bodies of this character the power to adopt rules, by-laws, and regulations reasonably necessary to carry out the

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purpose for which they are created, and this grant is not an improper delegation of authority. *Blue v. Beach*, 155 Ind. 121, and cases cited. This is held generally to be the rule in matters coming within the police power of the state. That the banking business comes within that power is no longer an open question. "The police power extends to all the great public needs (*Camfield v. United States*, 167 U. S., 518) and includes the enforcement of commercial conditions such as the protection of bank deposits and checks drawn against them by compelling co-operation so as to prevent failure and panic." *Noble State Bank v. Haskell*, *supra*.

The business of banking coming within the police power of the state, the same rule of construction may be applied to banking acts and to rules and regulations established by banking boards as applies to acts creating other administrative bodies coming within the police power. The supreme court of judicature of Indiana, in discussing this phase of the question, in *Blue v. Beach*, *supra*, say: "While it is true that the character or nature of such boards is administrative only, still the power, conferred on them by the legislature, in view of the great public interests confided to them, have always received from the courts a liberal construction, and the right of the legislature to confer upon them the power to make reasonable rules, by-laws, and regulations, is generally recognized by the authorities."

In that case the court was discussing rules and regulations made to protect the public health, but these rules and regulations are made under the police power of the state, and the same rule may reasonably be applied to all boards acting within that power. The rule adopted and followed by the banking board appearing to be a reasonable and salutary one, its action will not be disturbed. The judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

ROSE, J., not sitting.

MARTHA W. WHIPPLE, APPELLEE, v. JOHN H. ROSENSTOCK
ET AL., APPELLANTS.

FILED DECEMBER 23, 1915. No. 18518.

1. **Intoxicating Liquors: Loss of Support: Right of Action.** A married woman and her minor children consisting of one family may maintain an action for loss of means of support against all those who have furnished intoxicating liquors to the husband and father, which occasioned or contributed to the damages.
2. ———: ———: **DAMAGES.** In estimating the damages, the jury may consider the situation of the deceased, his annual earnings, if any, his habits, health, and reasonable expectancy of life.
3. ———: ———: ———. The right of support is not limited to the bare necessities of life, but in no case can the judgment be for a greater sum than the value of the means of support of which plaintiff has been deprived.
4. ———: ———: **ACTION FOR DAMAGES: ABATEMENT.** The death of the husband and father does not cause an action for loss of means of support to abate, the death being a mere incident, not the principal cause of action.
5. ———: ———: ———: **DEFENSE.** "A license is no protection to a vendor of intoxicating drinks in an action for loss of the means of support. The statute, in effect, says to every one engaged in the traffic, 'Beware to whom you sell or furnish intoxicating liquor.'" *Roose v. Perkins*, 9 Neb. 304.
6. ———: ———: ———: **PARTIES.** The bondsmen of the liquor dealers who have furnished intoxicating liquors to the husband and father may be joined with the liquor dealers as defendants in an action for the loss of support.
7. ———: ———: **DAMAGES.** Evidence examined, and *held* that a verdict for \$10,000 was excessive, and the amount of recovery is reduced to the sum of \$5,000.

APPEAL from the district court for Lancaster county:

P. JAMES COSGRAVE, JUDGE. *Affirmed on condition.*

T. J. Doyle, for appellants.

Burkett, Wilson & Brown, contra.

BARNES, J.

The plaintiff commenced this action against John H. Rosenstock, Alexander Butz, Charles A. Schwedop and Leonard Bauer, who were licensed saloon-keepers in the city of Lincoln, and their bondsmen, to recover damages which she alleged had accrued to herself and her two infant children by reason of the sale of intoxicating liquor to her deceased husband, Frederick H. Whipple. The action as originally commenced was against the persons and bondsmen above named, together with some others.

It was alleged in the petition that from January 1, 1912, the saloon-keepers therein named had sold, given to, and furnished her husband, Frederick H. Whipple, with large quantities of intoxicating liquors, which he drank, and thus had caused him to become intoxicated, debauched and an habitual drunkard; that her husband had abused her and neglected to furnish any support for herself and minor children; that before he became so debauched he was kind to her and had furnished his family suitable support in the way of food and clothing; that by reason of the use of the intoxicating liquors so sold, given and furnished him by defendants, he became sick and diseased in mind and body, and died on the 18th of August, 1912, of an injury to his arm, complicated by delirium tremens, and by reason of which she and her children had sustained damages in the sum of \$20,000, for which she prayed judgment.

The defendants answered separately. Each of the saloon-keepers denied that he had sold, furnished or given plaintiff's husband any intoxicating liquors, denied that Whipple was a sober and industrious man, and alleged that for many years he had been a confirmed drunkard. They denied that plaintiff had been damaged in her means of support by reason of any sales of liquor made by them to her husband; and the answers further denied that plaintiff was the wife of Frederick H. Whipple. They admitted that they were licensed saloon-keepers doing business in the city of Lincoln, and denied all the other allegations

of the petition. The reply was a general denial of the facts alleged in the answers.

When the case came on for trial in the district court for Lancaster county, and after plaintiff had introduced her evidence, the action was dismissed as to all of the defendants other than the saloon-keepers above mentioned and their sureties. The petition was amended so as to allege the sale to Whipple of intoxicating liquors from the 1st day of May, 1912, to the 15th day of August of that year, and the case was finally submitted to the jury as to such sales alone. After all of the evidence had been introduced, instructions were given, which were excepted to by each of the defendants. The jury returned a verdict in favor of the plaintiff and against all of the defendants for the sum of \$10,000, on which the court rendered judgment, and the defendants have appealed.

It is contended by the appellants that the evidence is insufficient to sustain a verdict for the plaintiff. The record fairly shows that each one of the defendant liquor-dealers sold and furnished to plaintiff's deceased husband intoxicating liquors, including beer, at some time during the period from the 1st day of May to the 15th day of August, 1912; that Frederick H. Whipple died on the 18th day of August, 1912, as alleged in plaintiff's petition. While there is some conflict in the evidence, that branch of the case was properly submitted to the jury. Under the provisions of chapter 40, Rev. St. 1913, as construed by the decisions of this court, the verdict of the jury on that question should be sustained. The saloon-keepers were jointly liable on their bonds for whatever damages the plaintiff may have sustained by reason of the traffic. *Roose v. Perkins*, 9 Neb. 304; *Kerkow v. Bauer*, 15 Neb. 150; *Warrick v. Rounds*, 17 Neb. 411; *Gorey v. Kelly*, 64 Neb. 605. The cases cited also dispose of the appellant's claim of misjoinder adversely to their contention, as will presently be seen.

It is strenuously contended that the verdict in this case was excessive. There seems to be merit in this contention.

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It appears from the record that the plaintiff and Frederick H. Whipple were married on the 28th day of June, 1904; that two children were born to them, both of whom are living, and at the time of the trial were aged five and eight, respectively; that at the time of the marriage the plaintiff's husband had employment as a buggy washer at the Palace livery stable in the city of Lincoln. The amount of his earnings at that time is not shown, but it is apparent that they were not large. It also appears that at the time he was addicted to the use of intoxicating liquors, but not to the extent of destroying his ability to work. For some time he had no steady employment, but worked at different places in the city and in private families; and his earnings did not exceed \$35 a month. It also appears that about four years before his death Whipple became an itinerant peddler of horseradish, peanut butter, hominy and some other household articles of food. There is no evidence in the record as to the amount of his earnings while he was engaged in that business, but it seems clear that they must have been limited to a rather small sum. A little later on Whipple commenced to prepare horseradish and hominy on his own account. This was peddled, together with icecream, popcorn, pop and some other things which he purchased of the manufacturers. These articles were peddled by him from about the first day of June until the latter part of September of each year. The record also shows that he sold hominy, horseradish and peanut butter a great part of the year. The plaintiff testified that he made in his business \$150 a month, but that was purely her opinion without any competent evidence to support it. She also testified that he furnished for the support of his family, \$25 a week. That testimony was also her opinion, and is not supported by any other evidence. The testimony of the grocer of whom Whipple bought his groceries was that his bills ran from \$3.50 to \$5 a week, but he was unable to state that Whipple bought all his meats and foods from him. It may be presumed that, while Whipple had credit at the

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grocery and ran a weekly account, he bought practically all of his supplies from him. There is no evidence in the record as to how much or what kind of clothing Whipple furnished his family. Plaintiff testified that after the 1st of January, 1912, he furnished them nothing, and that the only money she was able to obtain from him was \$5. The record clearly shows that Whipple at all times during the last ten years was an habitual user of intoxicating liquors; that his drinking had increased by January, 1912, to such an extent that he was unable to attend to his business; that just before his death he was trying to sell his wagon and outfit for \$40; that his business had become unprofitable; that he procured intoxicating liquors in bottles and jugs from some place other than that disclosed by the testimony, and kept intoxicating liquors in his house, his wagon and other places; that he drank to such an extent that on the evening of the 14th day of August, 1912, he fell and broke his arm; that his wife helped him into the house, undressed him, and put him to bed; that on the morning of the 15th a physician was called, who dressed the arm and sent him to a hospital, where he remained until the afternoon of the 17th of August, when he was sent home because of his conduct; that when he arrived at the house he became wild and incoherent and developed symptoms of delirium tremens; his conduct was such that his wife was afraid of him, and he was taken to a room in the county jail, where he died on the morning of August 18, 1912.

A the time of Whipple's death he was 54 years of age and had a life expectancy of 18 years. Considering the evidence contained in the record, we are of the opinion that the verdict was excessive; that by Whipple's death plaintiff and her children could not have been damaged in their means of support in any sum exceeding \$5,000.

The amount of plaintiff's recovery having been reduced to the penalty mentioned in a single bond furnished by the sureties there can be no contention of a misjoinder of of parties defendant. Plaintiff therefore is required to

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file a remittitur in the sum of \$5,000 within 20 days, and, if this is done, the judgment of the trial court will be affirmed for that amount, with the costs of that court; otherwise, the judgment will be reversed and the cause remanded.

AFFIRMED ON CONDITION.

LETTON, J., not sitting.

BARNEY MALKO, APPELLEE, v. CHICAGO, ROCK ISLAND &
PACIFIC RAILWAY COMPANY ET AL., APPELLANTS.

FILED DECEMBER 23, 1915. No. 18535.

1. **Railroads: INJURY TO PEDESTRIAN: DUTY OF TRAINMEN.** A pedestrian was struck by a passing train while walking along a well-beaten footpath between the main tracks of a railroad, which path had been used by the public for more than twenty years without objection by the company's officers and employees. He was apparently oblivious of the approach, but was seen for the distance of a quarter of a mile by the engineer and fireman of the train. He was struck by the overhang of the engine and severely injured. Under such circumstances it was the duty of those in charge of the train approaching him from the rear, not only to ring the bell, but to sound the whistle to warn him of his danger, and thus enable him to take a position of safety.
2. **Trial: INSTRUCTIONS.** Where the trial court has properly instructed the jury on the question of the plaintiff's contributory negligence, it is not reversible error to refuse to give another and more specific instruction of the same nature at the request of the defendant.
3. **Record examined,** and found that the other instructions were properly given and refused.
4. **Damages.** A verdict and judgment for the plaintiff for \$10,000, under the circumstances as shown by the evidence, *held* to be excessive, and the recovery is reduced to the sum of \$7,000.

APPEAL from the district court for Douglas county:
GEORGE A. DAY, JUDGE. *Affirmed on condition.*

William D. McHugh and W. H. Herdman, for appellants.

Gurley, Woodrough & Fitch, contra.

BARNES, J.

This was an action to recover damages alleged to have been sustained by the plaintiff by being struck by one of the defendant railroad company's engines attached to a passenger train running over the Union Pacific Railroad Company's tracks between Omaha and South Omaha.

It appears that on the 8th day of April, 1912, the plaintiff, with two companions, was walking from the packing houses in South Omaha toward the city of Omaha along a beaten path between the two main-line tracks of the Union Pacific Railroad Company. The place where the plaintiff was walking at the time of the accident was much used by pedestrians in traveling to and from the packing houses and had been so used for more than 20 years. It appears that there were signs posted along the right of way stating that the tracks were private grounds, and that persons using the right of way would be trespassers, but that rule had never been enforced by the officers or employees of the company. The defendant company in this case was using the Union Pacific tracks over which to run their through passenger trains from a junction near South Omaha to the Union Station in the city of Omaha. While plaintiff was walking along the path above mentioned, in the direction of Omaha, a through passenger train of the defendant company came from the south behind him and the overhang of the engine struck and injured him. One Nat Downes, who was the engineer in charge of the engine, was joined with the railroad company as a defendant.

Plaintiff's petition presented two theories on which a recovery was sought. First, that while the plaintiff was rightfully walking on the right of way of the railroad, and near the track upon which the engine and train were running, the defendants negligently failed to ring the bell or

blow the whistle or slow down the train or to warn the plaintiff in any way of its approach. The second theory is based upon the claim that, while plaintiff was walking near the track upon which the train was being operated, the defendant railroad company's engineer and fireman saw that he was in a position of peril, and, after seeing and knowing such situation, they negligently failed to give him any warning of the approach of the train by ringing the bell or sounding the whistle or slowing down or stopping the train so as to prevent the injury; that his injuries could have been avoided by the defendants, after seeing plaintiff's peril and danger, by exercising reasonable care to warn him by bell or whistle or slowing down and stopping the train.

The defendants filed separate answers, each containing certain formal admissions, and also a general denial and plea of contributory negligence, as follows: "Further answering said petition, the defendant alleges that whatever injuries were received by said plaintiff were received by him solely as the direct and proximate result of his own negligence and carelessness in not taking proper care to protect himself from injury, and in not taking proper care to avoid danger, in this, that said plaintiff carelessly and negligently stepped on the tracks or so near thereto as to be within the overhang of the engine and cars immediately in front of the engine operated by this defendant, which was bordering on said track, the said engine being in plain sight and but a few feet distant from said plaintiff." The reply to the answers was a general denial. On the issues thus joined the cause was tried in the district court for Douglas county. The jury returned a verdict for the plaintiff and against both of the defendants for the sum of \$10,000. Judgment was rendered on the verdict, and the defendants have appealed.

The only serious conflict in the evidence was whether the plaintiff, at the time the accident occurred, was walking so close to the track that he was in danger of being struck by the engine. The plaintiff's evidence was, in substance,

that he was walking along the path with his back towards the oncoming train; that he did not see the train and had no warning of its approach, and that he did not swerve to the right; that defendant Downes failed to ring the bell or sound the whistle of the engine before it struck him. On the other hand, the defendant's testimony was that the engineer and fireman saw plaintiff for about a quarter of a mile before the train reached him; that they thought he was a sufficient distance from the track to be out of danger, but just as the train reached him he turned, or swerved, to the right and towards the track, so that he was struck by the overhang of the engine, and was injured without any negligence on the defendant's part. It appears that the whistle was not sounded, but the defendants testified that the automatic engine bell was ringing. This conflict in the evidence was sufficient to take the case to the jury, for, if the whistle had been sounded, the plaintiff would have known of the approach of the train and would have removed himself to a place of safety.

Defendants' first contention is that the district court erred in refusing to give instruction No. 3, which they requested, for the reason that it fairly stated their theory of the case. It reads as follows: "You are instructed that if you find from the testimony that the plaintiff Malko, when first seen by the defendant Downes, the engineer operating the defendant company's train, was walking so far distant from the track on which said train was running as to be out of danger of injury therefrom as it passed him, then and in that case the defendant Downes, as the engineer of the train and operating the engine on said train, was not bound to check the speed of his train, and had the right to presume that plaintiff would continue to walk so far distant from the track as to be in no danger of injury from the passing of the train; and, if you find from the evidence that the plaintiff immediately before being struck by said train moved from his position of safety to the right and towards the track on which train was approaching, and

thus brought himself so near said track that he was struck by said train in passing, and you further find that after plaintiff so moved towards said track, the defendant Downes, in the exercise of all reasonable care and diligence on his part, could not check the speed of or stop his engine and avoid striking the plaintiff, then and in such case your verdict must be for the defendants." It appears, however, that the court gave a like instruction on his own motion. Paragraph numbered 9 of the court's instructions reads as follows: "The defendants allege in their answer that the injuries to the plaintiff were caused by his own negligence and want of care in looking out for his own safety, and the burden of proof is upon the defendants to show by a preponderance of the testimony that the plaintiff was negligent, and that his negligence contributed to the injury. And in passing upon this issue you are instructed that a person walking upon a railroad track is bound to exercise reasonable care for his own safety, and it was his duty to look and listen, such as an ordinarily prudent person would have done under the situation and surroundings then present. And if you believe from all the testimony that the plaintiff did not take such precautions in looking or listening or otherwise watching out for his own safety as an ordinarily prudent person would have done under the circumstances and surroundings then present, then you should find that the plaintiff was guilty of negligence, and if you further believe from the evidence that such negligence of the plaintiff contributed to his said injury, then he could not recover upon his first theory, and you will find for the defendants upon that issue." We are satisfied that this instruction fairly stated the defendants' theory, and, while it was not in the exact language of the one requested, its effect was the same, and the jury could not have been misled on the question of contributory negligence by anything contained therein.

It is further contended that the court erred in refusing to give instructions numbered 1 and 2 requested by the

the defendants. Without setting out these instructions, in the opinion, it may be said that they did not apply to the facts of this case.

The plaintiff, at the time he was injured, was walking along a well-beaten path which had been used by pedestrians for more than 20 years, with the knowledge and at least the tacit consent of the officers and employees of the railroad company. He was therefore not a trespasser in the strict sense of the word, but was in a sense a licensee, and the defendants were charged with the duty of so operating their train by giving suitable signals of its approach as to enable plaintiff to remove himself from the place of danger and thus avoid the injury. Many other assignments of error are based upon the refusal of the court to give requested instructions; but, after a careful examination of the record, we are of the opinion that the court did not err in giving any of the instructions given or in refusing to give any that were requested.

Finally, it is contended that the verdict and judgment is excessive. We think there is merit in this contention. It appears from the evidence, without dispute, that the plaintiff was a common laborer 39 years of age; that at the time he was injured he was earning \$1.75 a day. There is no evidence showing, or tending to show, that his earnings would ever exceed that amount. If plaintiff should work steadily for eight hours a day he would earn \$436.80 a year. Common experience teaches us that the hazard of sickness, disease, and loss of time is such that plaintiff could not reasonably be expected to earn that amount per year during his entire life expectancy. Again, the uncertainties of obtaining employment are such that there would be times when he could not earn that amount by reason of slack business conditions. The record shows that the injury to his shoulder and arm were severe and are permanent. It does not show, however, that he is wholly incapacitated. The evidence shows that after he recovered from his injury he worked for a time at one of the packing houses, and that while he so worked he re-

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ceived as wages 12 cents an hour, so it cannot be stated that he is wholly incapacitated from labor. His life expectancy was about 29 years, but, of course, it could not be expected that he would be able to continually labor for that length of time. The verdict and judgment in this case is \$10,000. We are of the opinion that a verdict for \$5,000 would compensate him for his loss of earning capacity. In addition to that, plaintiff should recover a reasonable sum for his pain and suffering, together with the amount necessary to pay for the services of his physician and his hospital charges. Allowing \$2,000 for those items, and adding this to his loss of earning capacity, we have \$7,000. This, we are of the opinion, would be amply sufficient to compensate the plaintiff for all of the injuries he has sustained. The verdict and judgment should be reduced to that amount.

It is therefore ordered that the plaintiff be required to file a remittitur in the sum of \$3,000, and, if such remittitur is filed within 20 days, the judgment of the district court, as thus reduced, will be affirmed; otherwise, the judgment will be reversed and the cause remanded for further proceedings.

AFFIRMED ON CONDITION.

SEDGWICK, J., concurs in the conclusion.

JOHN B. VAN BOSKIRK, APPELLEE, v. A. S. PINTO, APPELLANT.

FILED DECEMBER 23, 1915. No. 18330.

1. **Physicians and Surgeons: CARE AND SKILL: DIAGNOSIS.** A physician or surgeon, when he accepts employment to treat a patient professionally, must exercise such reasonable care and skill in that behalf as is usually possessed or exercised by physicians or surgeons in good standing, of the same system or school of practice, in the vicinity or locality of his practice, having due regard to the ad-

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vanced state of medical or surgical science at the time, and he is not liable for a mistake in judgment made in diagnosing a physical injury where he used such ordinary and reasonable care and skill, even though his judgment may be erroneous.

2. ———: ———: ———: SUFFICIENCY OF EVIDENCE. Evidence examined, and *held*, not to establish that the failure of defendant to procure a Roentgen ray picture to be taken of the plaintiff's foot and ankle as an aid to diagnosis constituted lack of reasonable care and skill under all the surrounding circumstances.
3. ———: ACTION FOR MALPRACTICE: REASONABLE CARE: QUESTION FOR JURY. The question whether a physician and surgeon, after having reasonable grounds to believe that he had made a mistake in diagnosis and that a fracture existed in a case where the injury had been considered by him to be merely a sprain, exercised reasonable and proper care and skill after he had reached such conclusion, is a matter, under proper pleadings and instructions, for a jury to determine, and it is *held* that there was sufficient evidence on this point to go to the jury.

APPEAL from the district court for Douglas county:
GEORGE A. DAY, JUDGE. *Reversed*.

Mahoney & Kennedy and *Philip E. Horan*, for appellant.

Brown, Baxter & Van Dusen and *M. L. Donovan*, contra.

LETTON, J.

This is an action against two physicians for malpractice. The case was afterwards dismissed as to Dr. Spaulding. The jury found for the plaintiff in the sum of \$1,500, and, from a judgment on the verdict, defendant Pinto appeals.

The facts developed at the trial are that on the 4th of May, 1912, the plaintiff, who was a man 27 years of age employed by a tent and awning company, was putting up awnings on the Omaha post office building. The ladder slipped and he fell a distance of about 15 or 18 feet. Dr. Spaulding was called, who gave him a hypodermic injection to relieve the pain. He was taken to a hospital, placed upon an operating table, and Drs. Pinto and Spaulding made an extended examination of his ankle,

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spending over half an hour in doing so. They diagnosed the injury as being a severe sprain. The ankle was placed in splints and the patient placed in charge of a nurse who was instructed to pour liniment upon it. Dr. Spaulding then gave the case over to Dr. Pinto. Three or four days after the injury the splints were removed, the foot placed on a pillow with a sandbag to support it, and the nurse was directed to massage the ankle and move it as much as the patient could stand. This was done each day. He remained under Dr. Pinto's care in the hospital 17 days. At the time he left he was unable to bear his weight upon the injured foot without pain or to walk without crutches, and finally the foot remained fixed in such a position that the front part of the foot was left at a downward angle from the normal position. On July 11 he suggested to Dr. Pinto he would like an X-ray taken. An X-ray picture was then taken by Dr. Tyler. It disclosed that the fall had caused a slight impacted fracture of the forward part of the astragalus and a rupture or raising of the periosteum on the posterior portion of this bone. A fluid exuded which afterwards hardened into a bony substance and formed a wedge between the articulation of the tibia and astragalus, thus causing the abnormal position of the foot.

Four physicians were called by the plaintiff. One of these physicians, Dr. Tyler, was an X-ray expert. He testified to having taken X-ray pictures of the plaintiff's foot on July 11 or 12, 1912, and on November 12, 1912, which disclosed practically the same conditions. The negative of the first picture was accidentally broken, but the pictures taken November 12 are in the record. Dr. Tyler testified that an X-ray picture taken at or about the time of the injury would not have disclosed the condition with reference to the periosteum or the effusion of the fluid; that the proper treatment for the impacted fracture would have been to keep the foot at rest by means of splints for six or eight weeks. He also testified that, if when Dr. Pinto examined Mr. Van Boskirk's ankle he

found swelling, mobility, no displacement, no dislocation, and no crepitation, his diagnosis in the first instance that his injury was a severe sprain would have been the diagnosis of an ordinary practitioner of the allopathic school of medicine in Omaha about May, 1912. The other three witnesses called on behalf of plaintiff testified substantially to the same effect, though one or two said that if the patient would stand the expense he would, in case of doubt, or under such circumstances, have had an X-ray picture taken. None, however, testified that this was the usual method. It was also proved that an operation to remove the bony growth could be as well made now as at any previous time. It was shown that few doctors in Omaha own X-ray machines, but that X-ray pictures may be procured by paying for them. The testimony of Dr. Pinto and Dr. Spaulding is to the effect that at the time of their examination they used all the well-known tests for determining whether there was a fracture or not. They found mobility, no dislocation, no crepitation, and nothing else that would indicate that a fracture had occurred. The conclusion which must be drawn from the testimony is that it does not establish that the failure to have an X-ray picture taken as an aid to diagnosis at this time constituted lack of reasonable care and skill under all the surrounding circumstances, and that if plaintiff's case rested upon the claim of negligent diagnosis alone the evidence would not support a verdict in his favor. The testimony showed that the treatment which was given to the ankle, while proper if the injury had merely consisted of a sprain, was improper for an impacted fracture, that in such a case the splints should have remained for several weeks and until there was no danger of the foot being distorted. It is shown that, if splints had been applied and the ankle bandaged so that the foot was kept at right angles to the leg, the bony fluid would have exuded into the space between the tibia and the astragalus, but the foot would have been left in its normal position. The evidence of plaintiff and his wife is that he had less pain

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when the foot was thus placed than when it was left in the slanting position which it assumed. The medical testimony is to the effect that this position was in all probability caused in the first place by the involuntary action and superior strength of the muscles of the calf over those of the front of the leg, but that later the position became fixed by the exudation and hardening of the callous between the bones.

The only question in the case as to which there is room for doubt is whether, after the diagnosis was made and after sufficient time had elapsed to show that the injury was in all probability more serious than a sprain, Dr. Pinto failed to give reasonable and proper treatment. The strongest evidence on this point was given by the defendant himself. He testified that he had an idea on the Saturday following the injury that there was a fracture of the articular ends of the bones, and that from the 11th of May he treated the case with the view that the ankle was fractured; that on the Saturday following the injury he suggested an X-ray, but that he did not mention this to Mr. Scott, the plaintiff's employer, who had directed him to take care of the plaintiff's case and to send him the bill; that on the 17th of May, the day the plaintiff was taken to his home, he told him he ought to have an X-ray, but the plaintiff said he could not afford it. On the other hand, plaintiff denies these statements, and testifies that while in the hospital he suggested that the X-ray should be used, but defendant said it was unnecessary, that there was no change in the treatment and on July 11 defendant said that with manipulation and massage of the ankle the stiffness would wear away in time. Two witnesses testify that while in the hospital the ankle was swollen and the foot turned to one side, that the doctor was informed that plaintiff complained that the foot felt as if it was twisted, and that it kept him on a nervous strain all the time, and that when Dr. Pinto dismissed the case there was still discoloration and swelling of the ankle. It seems to be established that, if the foot

could have been fixed in the natural position without severe pain while the patient was in the hospital, it would have been the correct and proper course of treatment for a fracture.

Counsel for defendant admits that the evidence disclosed that the treatment given was the proper treatment for a sprain, but not for the injury received, and asserts that the testimony with respect to what would have been proper treatment for a fracture was improperly admitted, since it was impossible to determine the real nature of the injury for weeks after it occurred. His brief "admits that, in order to absolve Dr. Pinto from all liability and from all negligence, it is necessary for us to go one step further and to consider the case in its development, not only from the point of view of the treatment actually accorded, but from the point of view of any symptoms that arose during the treatment that should have required Dr. Pinto to subsequently doubt the correctness of his original diagnosis." He insists in this connection that, if negligence did exist in this phase of the case, it was negligence for which a different rule of damages should have been laid down by the trial court, and he further complains of the manner in which the case was submitted to the jury, mainly for the reason that the charge included the element of negligence in the diagnosis, which there was no evidence to sustain. We are convinced that, if defendant was guilty of any negligence at all, it was in failing to change his manner of treatment after he had reason to believe that a fracture had occurred, and that the other question should not have been submitted.

The petition, after pleading negligent diagnosis, in substance alleges that defendant wrongfully advised plaintiff that his injuries were being properly treated and he would soon recover the use of his foot and ankle, and that, relying thereon, plaintiff was induced to allow defendant to continue to treat the injuries until about June 22, 1912, when plaintiff was discharged from further treatment, and that, if defendant had properly diagnosed the injury and

had properly treated the same, he would have wholly recovered in two or three months and would have had the unimpaired use of his limb. It is with some hesitancy that we have come to the conclusion that under these allegations proof of negligent and unskilful treatment, after Dr. Pinto had reason to believe a fracture had occurred, may be made. There is sufficient evidence on this point to go to the jury. We believe that the defendant's substantial rights were injuriously affected by the submission to the jury of the question as to negligence in the original examination and diagnosis. The judgment of the district court is

REVERSED.

SEDGWICK and HAMER, JJ., not sitting.

ELLA HUXOLL, ADMINISTRATRIX, APPELLEE, v. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED DECEMBER 23, 1915. No. 18377.

1. **Appeal: HARMLESS ERROR.** Under section 7713, Rev. St. 1913, an error which does not affect the substantial rights of a party will not justify a reversal of a judgment.
2. **Master and Servant: INJURY TO SERVANT: DEFENSES.** Under the federal employers' liability act contributory negligence is not a complete defense in any case, and assumption of risk is only eliminated as a defense in cases where the "violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." 4 U. S. Comp. St. 1913, sec. 8659, p. 3914.
3. ———: ———: **ASSUMPTION OF RISK.** An employee assumes the ordinary risks of his employment, but he does not assume the extraordinary risks caused by direct acts of negligence of his employer.
4. ———: ———: **NEGLIGENCE.** *Glantz v. Chicago, B. & Q. R. Co.*, 90 Neb. 606, followed.
5. ———: ———: ———: **CONTRIBUTORY NEGLIGENCE: QUESTION FOR JURY.** Plaintiff's intestate was a locomotive engineer in the service of the defendant. He was directed to take an engine stationed

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in the yard of defendant at Sidney and proceed to another point on the line for the purpose of bringing in a train used in interstate commerce. A strong north wind was blowing, the thermometer was 10 to 15 degrees below zero, snow was on the ground and was drifting, and clouds of smoke and steam from the roundhouse and from engines made it almost impossible to see ahead. As deceased was approaching his engine, he went between the rails of the main-line track. A high-tank road engine engaged in switching in the yards, moving backwards, without lookout, warning or signal, at a rate variously estimated at from three to eight miles an hour, at a point where the smoke and steam were so dense that objects one or two feet away could not be seen, struck and killed the deceased. *Held*, that a finding that the defendant was guilty of actionable negligence is sustained by the evidence, and that the question whether the deceased was guilty of contributory negligence was for the jury.

6. ———: ———: ASSUMPTION OF RISK. A locomotive engineer in walking to his engine in the switching yards of a division station through a cloud of smoke and steam does not assume the risk that his employer will negligently propel an engine backwards through the yards and through dense clouds of smoke and steam without warning of some character either by bell, whistle, light, or lookout.
7. Instructions given and refused, examined, and *held*, that no prejudicial error was committed by the court with respect thereto.
8. **Appeal: SPECIAL INTERROGATORIES: DISCRETION OF COURT.** It is within the discretion of the court to submit special interrogatories to the jury when requested, and, unless an abuse of such discretion is shown, such a refusal will not be held to be erroneous.
9. Instructions given to the jury will be considered together, and, if the charge taken as a whole properly and fairly submits the issues in the case, a mere technical inaccuracy in one or more will not justify a reversal of the judgment for that reason alone.

APPEAL from the district court for Lancaster county:
P. JAMES COSGRAVE, JUDGE. *Affirmed*.

Edson Rich, A. G. Ellick, E. C. Strode and B. W. Scandrett, for appellant.

Stout, Rose & Wells, Hoagland & Hoagland and Wilmer B. Comstock, contra.

LETTON, J.

This is an action to recover damages on account of the death of Fred J. Huxoll, the husband of the plaintiff, by

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reason of certain alleged acts of negligence on the part of the Union Pacific Railroad Company. Plaintiff, as administrator, recovered judgment for \$20,000 for the benefit of herself and children. Defendant appeals.

Huxoll left surviving him his widow and two minor children. At the time of his death he lived at North Platte, and was a locomotive engineer in the service of the defendant, running between North Platte and Sidney. On the morning of January 1, 1911, Huxoll, while at Sidney, was called and ordered to take engine No. 1909, to leave at 11:10 A. M., with another engine and run to Perdue to bring in a freight train. The engine was headed westward and was to run backward to Perdue. At the time of the accident he was proceeding to his engine in response to the call. The train he was to move was being used in interstate commerce. The train order gave these engines a clear track and right of way over all trains on the main line. Sidney is a division station, and defendant maintains there a roundhouse, turntable, water-crane, wash-house and switching yards. Near the water-crane there is what is known as a "spot track" on which engines are stationed after being coaled, watered and made ready to be taken out. The water-crane and "spot track" are some distance south and east of the wash-house. In order to reach the engine it was necessary for Huxoll to cross one or more tracks and to proceed some distance eastward, passing the turntable, with the main-line track to the north. On this morning engines 1913 and 1909 were upon the "spot track," 1913 standing at the water-crane and 1909, Huxoll's engine, farther east. The weather was extremely cold, 10 to 15 degrees below zero, and a strong north or northwest wind was blowing. The roundhouse is situated to the south of a bluff, the elevation of which is from 100 to 200 feet in height. It was snowing, and the ground and tracks were covered with snow about two inches deep when undisturbed by the wind. Clouds of smoke from the roundhouse, steam from the engines and snow from the storm were blowing across the yards, and

in places it was almost impossible to see more than a foot or two. The water-crane stood upon a small platform about 12 feet long from east to west. There was a pit and drain connecting with a sewer in order to carry off the overflow, but, on account of the intense cold, there was more or less ice around and about the platform. Plaintiff's theory of the case, which is supported to some extent by testimony, is that as Huxoll, in going to his engine, approached the crane and platform, in order to avoid walking upon the ice, he stepped around it upon the main-line track. There was a cloud of fog, steam and smoke at that point. Almost instantly he was struck by an engine running backwards to the west, which gave no signals of its approach, and which was running about eight or ten miles an hour. The whistle was not sounded, and the bell was not rung, the machinery to ring the bell automatically was out of order, and the power brake upon this engine was defective. Huxoll was knocked down, was dragged by the ash pan and brake beams a distance of about 75 feet, and the leading end of the engine moved about 150 feet before it was stopped. He was then extricated, but died soon afterwards.

The specific allegations of negligence in the petition, much abridged, are: Negligence of defendant in maintaining the roundhouse in close proximity to the main-line track and to the water-crane and engine tracks, so that the smoke and steam therefrom enveloped and obscured its engines, and obstructed the view of engine and train movements upon the tracks; negligence in permitting an accumulation of ice about the crane, in permitting the crane to become out of order so as to permit the escape of water on the ground, where it froze and rendered the way slippery and dangerous, making it necessary for Huxoll's safety that he make a slight detour in his course and go upon the main-line track; negligence and carelessness in using in switching an ordinary locomotive with high tank, instead of a switch engine with a sloping tank, so as to allow a free and unobstructed view of the track

in either direction, and in failing to station a man on the front end of the engine for the purpose of warning persons upon the track, and it is alleged that "in general and common practice a brakeman or other servant is so stationed for that purpose;" negligence in not providing a foot-board, and in running the engine at a high and dangerous rate of speed, "and not under control." It is also charged by amendment that the power brake on the engine was broken and defective, that the bell was defective and out of repair, and that no warning signals of any kind were given.

The answer, in substance, is a general denial, with a plea of assumption of risk and contributory negligence. An amendment was filed pleading that the acts of negligence set out in the amendment to the petition were not alleged in the original petition and were not charged within two years after such acts are alleged to have occurred.

Defendant assigns 56 errors as ground for the reversal of the judgment. We cannot consider them in detail. Some are complaints of mere technical irregularities of a nature which may and usually do occur in the trial of almost every case where so much testimony was taken. We have passed the day when an error which does not injuriously affect the substantial rights of a party will entitle him to a reversal of the judgment, and it serves no useful purpose for parties to complain of, or for courts to consider and discuss, mere lapses from strict and formal methods of procedure. This applies with most force, perhaps, to assignments of error in rulings upon the admission of evidence. Unless prejudice appears to have resulted from an erroneous ruling of this nature, a judgment will not be reversed upon that ground.

Many assignments of error are made as to the giving and refusal of instructions. The court gave 29 instructions on his own motion. The defendant requested 47. In its charge the court practically eliminated a number of the grounds of negligence charged in the petition. The

only questions left were whether the defendant was guilty of negligence in failing to have a lookout on the leading end of the switch engine; in moving it at an excessive rate of speed under the circumstances and in failing to keep it under control; whether the track was obscured by smoke and steam; whether the death of Huxoll resulted in whole or in part from its negligence; whether the power brake of engine No. 213 was in working order at the time of the accident; and, if not in working order, whether such condition contributed to his death.

The complaint is made that the court should have told the jury that Huxoll was guilty of contributory negligence, as a matter of law, and that each of the instructions tendered by defendant should have been given. The instructions tendered by defendant endeavored to separate into distinct elements each charge of negligence made by plaintiff, and requested a specific direction that each of these charges would not warrant a verdict for the plaintiff. Some of these instructions are so clearly erroneous that they are not worthy of consideration and should never have been requested. Such requests entail needless labor upon trial and reviewing courts. An illustration is No. 2, which asked the court to instruct that Huxoll was not engaged in interstate commerce at the time he received the injuries. The substance of some and the identical language of a number of others were adopted by the court and incorporated as a part of its own instructions.

The gist of the requested instructions is contained in defendant's No. 1, that the jury be directed to find for the defendant. The testimony is so conflicting, not only for the reason that the witnesses differ, but because some of the witnesses for each party told materially different stories at different times, that it is almost impossible for a reviewing court, which cannot see the witnesses, to determine what the true facts are. The verdict of the jury must be taken as settling their credibility.

We will endeavor to notice the assignments in the order followed in defendant's brief, but cannot within the proper limits of an opinion discuss them at length. It is contended that the court should not have submitted to the jury any issue as to the condition of the brakes on engine No. 213. There is a sharp conflict in the testimony with respect to the condition of these brakes. Zimmer, the engineer, testified that about 8 o'clock of that morning he noticed that the air was not working properly, and he found upon investigation that the brake pistons were not working on account of ice that was frozen upon them, coming from a washout plug above them; that he then procured and set fire to some waste and oil and applied it to the brake cylinders until the brakes worked, and he had no more trouble with them. The testimony of other engineers, having experience with air brakes, but who do not testify with respect to this particular engine, is that in very severe, cold weather the air appliances sometimes freeze and require to be thawed out. Matthews, the fireman, testified the air was not working, and the brakes could not be used at the time of the accident. The other men working with the engine testify that the brakes were in perfect working order at that time. If material, there was sufficient conflict in the evidence to take the matter to the jury.

We are unable to see wherein the condition of the brakes had anything to do with the accident, unless an inference may be drawn from the testimony that, if the brakes had been working properly, the engine, after knocking Huxoll down, would not have injured him fatally; that, when the switchman on the engine called to the engineer, an immediate stop could have been made, and Huxoll would not have been entangled in the brake. If the engine was only moving at the rate of three or four miles an hour, as these men say, the evidence shows that if the brakes had been set at once the engine would have made a quick stop and would not have dragged Huxoll for 60 or 70 feet. Riggs called to the engineer as soon as he felt the jolt occasioned

by the trucks running over Huxoll. The accident would have happened if the brakes had been working, since they were not applied, or attempted to be applied, until after Huxoll had been knocked down and run over. It seems a fair inference that Huxoll was fatally injured when run over by the trucks, although he was conscious after being extricated; but the evidence is not entirely clear, and we think there is sufficient doubt to render this a question for the jury. Defendant argues that, if deceased was injured by a defective brake, the defense of assumption of risk and contributory negligence are by the federal statute eliminated, and that it therefore was prejudicially erroneous to allow this issue to go to the jury. It is true that the statute thus provides, but we think that under the facts in this case the defendant is not in a position to complain that its substantial rights were adversely affected by the submission of these issues. We cannot give this matter the importance attached to it by defendant. Independent of the provisions of the federal law, we take the view that, though Huxoll assumed the ordinary risks of his employment, he did not assume such an extraordinary risk as that his employer would carelessly and negligently, while he was enveloped in a dense cloud of smoke and steam and was engaged in proceeding to his engine in the course of his duties, without warning or signal of any kind, run an engine through the fog and darkness upon him at such a rate of speed that it was impossible for him to know that it was coming until he was struck. Under the undisputed facts, the applicability of the safety appliance law is of no importance.

It may be as well at this point to say that there is practically no conflict in the evidence with respect to the condition of the weather, and the density of the clouds of smoke and steam that were flying; men who were working from 17 to 25 feet away from the switch engine as it passed the water-crane neither heard nor saw the engine until after the accident. There is conflict as to the ex-

tent of ice on or about the water-crane and platform, and a positive and direct conflict as to whether the bell was sounded on the switch engine, whether the bell ringing apparatus was in working order, as to the rate of speed that the engine was moving, and as to whether it was a custom or usual practice in the Sidney yards for a man to be stationed upon the foot-board at the forward end of the switch engine in order to warn persons on the tracks. It is shown by the testimony of defendant's employees that, in conditions such as were prevalent that morning where the vision was blinded by storm or fog, proper care in the movement of trains in the yards required greater precautions than when the vision is clear.

It is argued that the court erred in refusing instructions telling the jury that there was no evidence that defendant was negligent in the location of its roundhouse or in permitting clouds of smoke and steam to escape therefrom, and in giving instruction No. 15, which is as follows: "The distance from the main-line track at which the roundhouses of the defendant were located, the elevation of the ground beyond the roundhouses, the tendency of smoke from the roundhouses to collect about the tracks, and the presence of ice, to some extent, at least, in the vicinity of the water-crane, together with the conditions of the weather, as shown by the evidence, are proper subjects of consideration in determining whether the acts of the defendant's servants, on the one hand, and of the deceased, on the other, were such as persons of ordinary care and prudence would have done at the time and under the conditions surrounding the casualty in question; but the incidents just referred to are not, in and of themselves, causes or grounds of negligence upon which a recovery in favor of plaintiff can be had." There was no error in this. It would have done no harm to give the requested instructions withdrawing these grounds, but this was practically done by the foregoing instruction, and it was certainly proper to allow the jury to consider all the surrounding circumstances in determining whether the de-

fendant's servants were negligent and whether the deceased acted with proper care.

Assignments 5, 6 and 7 are with respect to the refusal to charge that the water-crane was not out of repair, and that there was no evidence that ice had negligently been permitted to accumulate around and about it. The charge that there was no proof that the water-crane was out of repair might properly have been given, but the jury could not have been misled by the failure to give it. As to the evidence of ice about the water-crane, Dupont, the fireman on Huxoll's engine, testified that Huxoll and he went southwest from the wash-house to a point between the turntable and the main line, and then went east, he walking north of the main line and Huxoll about 10 feet behind him between the rails; that when about 30 feet west of the crane he heard a noise like an engine, either east or west of them, and called to Huxoll; that his grip was struck by an engine and knocked out of his hand, and he turned and at that instant saw Huxoll knocked down. In a previous statement he had said that Huxoll was struck about 10 or 12 feet west of the water-crane. The yardmaster testified that there was more or less ice all about the platform and the track at the crane, and that about 15 feet west of the crane he found marks in the snow in the middle of the track that indicated Huxoll had been knocked down at that point. This is only about two steps from the west end of the platform. If the jury disbelieved Dupont's later testimony, and there was ice frozen on and about the platform, Huxoll, if walking parallel with the main track, may have stepped between the tracks to avoid the ice, or he may have lost his way in the dense cloud of smoke and steam. Plaintiff argues that Huxoll's body may have been driven backward when he was struck, so that he fell further to the west than where he was walking when struck. Whether this is a proper inference was a matter for the jury. We think that all the facts as to the conditions surrounding the

water-crane and platform were proper to be submitted, and no prejudicial error was committed in relation to this issue.

The next complaint argued is as to the instructions given and refused with respect to whether there was a rule or custom requiring switchmen to ride on the leading end of the switch engines in the Sidney yard. There is a conflict of evidence upon this, and the evidence to establish such custom is not strong. It may be noticed that a number of the questions asked by counsel for the defendant upon this point contain a negative pregnant. For example, in the examination of the foreman in charge of the roundhouse, defendant asked: "Do you know whether or not there was, or was not, a custom or practice, in that yard, on January 1, 1911, or prior to that time, of having any switchman riding on the leading end of the engine through the yards, for the purpose of warning or giving warning to the engineer of obstruction upon the track, or flagging the engine through steam or smoke? A. No, sir; there was no practice that I knew of, or observed." A similar question was asked Mr. Borton, the yardmaster: "Q. What was the practice or custom with reference to having a flagman or a switchman on the front end of an engine in switching in the yards, on the leading end of the engine, in order to flag the engine through steam or smoke or storm? A. We never put a man there for that purpose; it wasn't necessary." The questions do not ask whether a custom of placing men upon the leading end of engines while moving in the yards existed, but whether it was the custom to put them there to warn the engineer or to flag the engine. The court is committed to the doctrine of the *Glantz* case (*Glantz v. Chicago, B. & Q. R. Co.*, 90 Neb. 606) that to run a high-tank road engine backwards through railroad yards without a lookout, when to have one is the usual custom in such yards, is a negligent act. This is a humane doctrine, and we adhere to it. It may be true, as defendant asserts, that the cloud was so dense that a lookout could not have warned Huxoll

until too late, but the surrounding conditions were in evidence, and the matter was for the jury.

The court in this connection gave the following instruction: "25. The fact that road engine No. 213 was used by defendant for switching purposes at the time of the accident is not in and of itself negligence, and a recovery in plaintiff's favor cannot be based upon the fact that such engine was so used. It is proper, however, to take into consideration the type, form and equipment of said road engine, and any variance in its equipment from the class and type of engine usually employed in the switching service in determining whether the acts of defendant's servants, on the one hand, and of the deceased, on the other, were such as persons of ordinary character and prudence would have done at the time and under the conditions surrounding the casualty in question." This is as far as the court should have gone in withdrawing this issue from the jury.

Defendant contends there is no duty on the part of a railroad company to warn employees in its yards of moving engines, and cites the case of *Anderson v. Missouri P. R. Co.*, 95 Neb. 358, as establishing such a principle. No such weather conditions obtained in that case, and the rule announced cannot apply here.

Complaint is made that many of defendant's rules relating to the general operation of engines and not confined to their operation in switchyards were erroneously admitted in evidence. This is true as to several of the rules read to the jury, and, if we were satisfied the jury had been misled by any of this evidence, we would without hesitation reverse the judgment. But we are not so convinced. One of the rules complained of requires yard engines to display a headlight to the front and rear, by night, and another rule provides that, "when weather or other conditions obscure day signals, night signals must be used in addition." These rules were relevant, and it was for the jury to determine whether they were violated. Defendant was by no means free from the erroneous prac-

tice of offering immaterial rules. Other testimony was improperly admitted, but we are unable to see how its admission could have changed the result.

It is complained that the court erred in refusing to submit a special interrogatory as to the amount which the jury deducted for contributory negligence. The amount of the verdict indicates that the jury found no contributory negligence existed. The submission was a matter for the discretion of the trial court, and no abuse of discretion has been shown.

We are convinced that the facts in the case warrant the conclusion reached by the jury. The peculiar conditions demanded special care. Granting that the brakes were not out of repair, that there was no ice around the water-crane that required Huxoll to step between the tracks to avoid it, and that it was not customary to have a lookout on the leading end of the engine under ordinary conditions, still the reckless manner in which the engine was sent into the fog and cloud in the yard, without warning, as the jury evidently believed and found from the evidence, constituted such carelessness as to justify a verdict, and the question whether, under all the conditions, Huxoll was guilty of contributory negligence in being between the rails when struck was also one for the jury to determine.

The questions of law governing this case are few and simple, though the record is long and the briefs are elaborate. We find no error prejudicial to the substantial rights of the defendant, and the judgment of the district court is therefore

AFFIRMED.

ROSE and HAMER, JJ., not sitting.

OSCAR C. ENG, APPELLANT, v. GEORGINE C. OLSEN,
APPELLEE.

FILED DECEMBER 23, 1915. No. 18515.

1. **Easements: WAY OF NECESSITY: IMPLICATION.** A way of necessity over the land of a grantor is not generally implied in favor of a grantee who has a convenient outlet across his own land which adjoins that conveyed.
2. **Homestead: CONVEYANCE: EXECUTION.** A 99-year lease purporting to grant a right of way for a road across the homestead of a married person is void unless executed and acknowledged by both husband and wife. Rev. St. 1913, sec. 3079.

APPEAL from the district court for Madison county:
ANSON A. WELCH, JUDGE. *Affirmed.*

H. Halderson, for appellant.

William V. Allen and William L. Dowling, contra.

ROSE, J.

This is a suit to enjoin the obstruction of a roadway 33 feet wide and 227 feet long, extending west from lands owned by plaintiff to a highway running north and south. The strip of land in dispute is the north half of part of an abandoned highway along the section line running east and west between the counties of Madison and Platte, near Newman Grove. When the parties were adjoining proprietors, with the section line north of plaintiff and south of defendant, the latter sold and deeded to the former for \$250, May 24, 1902, a small triangular tract with its southwest corner at the southeast corner of the roadway in controversy. The western boundary of the conveyed land, a line running north and south, is other land of defendant, and the northern and eastern boundary is a railroad right of way running northwest and southeast; the southern boundary being land of plaintiff. In the petition it is averred, in substance, that the tract sold

was inaccessible and landlocked; that it was deeded to plaintiff by defendant and her husband; that simultaneously with, and as a part of, the same transaction, defendant, pursuant to agreement, signed and acknowledged a writing, granting to plaintiff the right to use for roadway purposes for 99 years the 33-foot strip described; that she afterward obstructed the road. The granting of an injunction was resisted on the grounds that plaintiff, by means of his own land, had convenient access to the tract purchased by him, and that the 99-year lease was void because the land described therein was part of the homestead of plaintiff and her husband, and was not signed and acknowledged by the latter. The trial court dismissed the suit, and plaintiff has appealed.

Plaintiff claims a way of necessity, and argues that an injunction to protect it should have been granted. On this issue the trial court properly found for defendant. A way of necessity is not implied from the existing conditions, from the transactions of the parties, or from the instruments executed. Plaintiff, by using his half of the abandoned highway for a distance of 260 feet, may have convenient access to the tract purchased and an outlet to a public highway. In the deed a piece of land was described without reference to the means of access. The parties thereto did not understand that its terms implied a way of necessity over other land of defendant. A separate lease for a roadway was deemed necessary. The lease itself did not imply such a right, because it contained the specific grant of an easement. Since plaintiff has an outlet over his own land to a public highway, a way of necessity across the land of defendant does not exist. 9 R. C. L., p. 768; *Doten v. Bartlett*, 107 Me. 351, 32 L. R. A. n. s. 1075.

The principal question presented by the appeal may be stated thus: Is an instrument granting for a term of 99 years a right of way for a road across the homestead of a married person void unless executed and acknowledged by both husband and wife? The answer must be found in

the terms of the statute providing: "The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife." Rev. St. 1913, sec. 3079.

Plaintiff argues that the granting of the easement does not interfere with the substantial enjoyment of the homestead or conflict with the terms of the statute. On this proposition the courts differ. The doctrine invoked by plaintiff was announced by the supreme court of Iowa and followed in Texas. *Chicago & S. W. R. Co. v. Swinney*, 38 Ia. 182; *Marxwell v. McCall*, 145 Ia. 687; *Randall v. Texas C. R. Co.*, 63 Tex. 586; *Chicago, T. & M. C. R. Co. v. Titterington*, 84 Tex. 218. In applying similar statutes, however, the Iowa ruling adopted in Texas has been rejected by the courts of other states. The weight of authority and the better reasoning support the rule that the granting of a right of way for a road across the homestead of a married person is void unless executed and acknowledged by both husband and wife. *Delisha v. Minneapolis, St. P., R. & D. E. T. Co.*, 110 Minn. 518, 27 L. R. A. n. s. 963, and note; *Lindell v. Peters*, 129 Minn. 288; *Kelly v. Mosby*, 34 Okla. 218.

In *Pilcher v. Atchison, T. & S. F. R. Co.*, 38 Kan. 516, it is said: "The case of *Chicago & S. W. R. Co. v. Swinney*, 38 Ia. 182, has been examined with some care. It holds that 'the husband can convey a right of way over the homestead without the concurrence and signature of the wife to the deed, when such conveyance will not defeat the substantial enjoyment of the homestead as such.' The qualifying expression involves trouble. Who is to determine whether or not the right of way will not defeat the substantial enjoyment of the property? The court says, if the homestead were a single lot, and the right of way occupied it all, or most of it, the case would be very different. Why different? The rule of the Iowa case is too flexible. We cannot adopt it. In this state all questions affecting the rights of the wife and children in the

homestead must be discussed and determined by the constitutional and statutory enactments regarding them. These create them, fix their limits, direct their operation, and have such mandatory force of expression that this court can discharge its duty respecting them only by a strict adherence to the letter of the organic command. The homestead law is a part and parcel of the public policy of the state, and its provisions in cases of this character cannot be waived or avoided, except by an exact and literal compliance with the mode and manner it has prescribed."

Upon the same subject the supreme court of Mississippi said: "Our statute, however, requires the signature of the wife of the owner to validate a conveyance of the homestead or an incumbrance upon it. A right of way for a railroad company is, from its essential nature, an interest in land, and, to the extent of the land taken, is a direct diminution of the homestead. The statute which inhibits the conveyance of the entire homestead by the owner inhibits the conveyance of any part of it, for the whole includes all its parts, otherwise the statute would be rendered ineffective by construction." *Gulf & S. I. R. Co. v. Singleterry*, 78 Miss. 772.

The statute, without exception, applies to instruments conveying or incumbering the homestead. The trend of judicial construction in Nebraska is to avoid an interpretation which would facilitate the impairment of the homestead estate without compliance with statutory formalities. For the reasons stated, the lease does not create rights which can be protected by injunction. This conclusion is a necessary result of enforcing the homestead law.

AFFIRMED.

LETTON, J., not sitting.

IRA L. PHILLIPS V. STATE OF NEBRASKA.

FILED DECEMBER 23, 1915. No. 19048.

Criminal Law: APPEAL: PREJUDICIAL ERROR. In a prosecution for arson, the erroneous admission of prejudicial proof tending to show that accused, at another time and place, committed a crime similar to that with which he is charged is ground for reversing his conviction.

ERROR to the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Reversed.*

B. F. Gilman, Allen G. Fisher and William P. Rooney,
for plaintiff in error.

Willis E. Reed, Attorney General and Charles S. Roe,
contra.

ROSE, J.

In an information filed in the district court for Dawes county, Ora E. Phillips and Ira L. Phillips were charged with arson. They were accused of setting fire to a storehouse owned by George H. Young in the town of Marsland with intent to burn and destroy it. On a separate trial Ira L. Phillips, defendant, was found guilty and sentenced to serve a term of not less than one nor more than seven years in the penitentiary. As plaintiff in error he presents for review the record of his conviction.

The information is challenged for duplicity and for failure to charge that defendant was a tenant of the owner of the storehouse. According to a former ruling the information properly charged a single offense. *State v. Martin*, 87 Neb. 529.

A reversal of the conviction is sought on the ground that the trial court erred to the prejudice of defendant in admitting in evidence testimony implying that he had previously been implicated in another felony of the same nature as the one charged in the information. The fire which defendant was convicted of starting was observed

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about 8:15 in the evening, September 24, 1914, and the state adduced proof tending to show: It started in the basement of a building in which defendant and his brother, Ora E. Phillips, conducted a general store. The storehouse was owned by George H. Young, from whom it had been leased for mercantile purposes. Defendant's brother was the holder of the lease. The stock of goods was insured in the name of the brother for \$750, a fair valuation. He had made application for additional insurance, but had not procured it. The fire was promptly discovered, was confined to the basement, and was soon extinguished; little damage being done. In addition to evidence of the facts narrated, there was proof of circumstances tending, by inference, to implicate defendant in the starting of the fire, though there was no direct evidence of his guilt.

The testimony challenged as erroneous and prejudicial relates to a previous fire which destroyed a storehouse containing a stock of merchandise in the same town. As part of its case in chief, the state, over the objections of defendant, was permitted to adduce proof tending to show that the previous fire occurred July 8, 1914; that the Farmers Co-operative Company had conducted a general store in the consumed building; that Ora E. Phillips was secretary and manager of the Farmers Co-operative Company; that defendant was a clerk in the store; that the merchandise was insured; that the stock was a total loss, with the exception of some unconsumed goods invoiced at \$1,055; that defendant's brother was indebted to the Farmers Co-operative Company, and that the indebtedness of the latter was far beyond what he represented it to be in his report to the directors; that the Farmers Co-operative Company was known by him to have been insolvent at the time its property was destroyed by the fire, but its insolvency was then unknown to its stockholders and directors.

A large part of the state's evidence related to the fire of July 8, 1914, to defendant's connection with the stock

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of merchandise then destroyed, and to the motives for its destruction. The plain inference from the testimony of this character, much of which is immaterial, is that defendant and his brother started the fire in the co-operative store. This was not competent evidence tending to show that defendant set fire to Young's storehouse. The jury were not directed to confine their consideration of such proof to the question of motive or intent or to defendant's interest in the store conducted in the building fired September 24, 1914. On the contrary, the charge as a whole amounted to a direction to consider the inadmissible testimony as circumstantial evidence of defendant's guilt; there being no direct evidence thereof. It follows that the rulings challenged were both erroneous and prejudicial. They cannot be justified under any exception to the rule excluding proof that accused, at another time and place, committed a crime similar to that with which he is charged. *Cowan v. State*, 22 Neb. 519; *Berghoff v. State*, 25 Neb. 213; *Morgan v. State*, 56 Neb. 696.

The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED.

MORRISSEY, C. J., and LETTON, J., not sitting.

MARGARET M. WILCOX, APPELLEE, v. BADGER MOTOR CAR COMPANY, APPELLANT.

FILED DECEMBER 23, 1915. No. 18336.

Contracts: CONSTRUCTION: DIVISIBLE CONTRACT. The contract and bill of sale set out in the opinion, examined, construed together, and held, to constitute a divisible contract.

APPEAL from the district court for Douglas county:
GEORGE A. DAY, JUDGE. *Affirmed.*

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John W. Parish and Amos E. Henely, for appellant.

Rosewater & Cotner and Charles H. Marley, contra.

FAWCETT, J.

On April 3, 1911, H. E. Wilcox, of Omaha, husband of plaintiff, entered into a written contract with the defendant for the purchase of two separate lots of automobiles, of four and three cars, respectively, and for the appointment of himself as agent for defendant in the sale of its cars. The four cars were described in the contract as "lot one" and the other three as "lot two." The contract provided that he was to pay for the four cars by conveying to defendant 200 acres of land in Custer county, and was to pay for the other three cars cash on delivery, or rather, cash before delivery. Upon delivery of the deed and an abstract showing good title to the Custer county land, defendant was to execute to Wilcox a bill of sale for the four cars in lot one. About 19 days later Wilcox advised defendant that the land belonged to plaintiff (his wife), and directed that the bill of sale to the four cars in lot one be made to her, and on April 26, 1911, the defendant did as directed. One of the cars in lot one was delivered by defendant. Two of the cars in lot one were shipped to H. E. Wilcox, together with one car of lot two. Wilcox paid for the one car in lot two, and the three cars were delivered, Wilcox receiving one and plaintiff two. Later defendant shipped to Wilcox the remaining one car of lot one and the remaining two cars of lot two. Wilcox failed to pay for the two cars of lot two and they were not delivered to him, nor was the one car of lot one delivered to plaintiff. Thereupon plaintiff instituted this action and attached all three of the cars for the purpose of enabling her to recover her damages by reason of defendant's failure to deliver the fourth car of lot one. Defendant gave the necessary bond provided by our statute, and all three of the cars were returned to it at its factory in Columbus, Wisconsin. Defendant filed an answer in the action, in which it claimed that the contract for the seven

cars was an entire contract, and counterclaimed for damages by reason of the failure of Wilcox to pay for and receive the two cars of lot two. The trial court held that the contract was divisible and refused to submit defendant's counterclaim to the jury, but submitted only the question of the value of the car of lot one which was not delivered to plaintiff. The jury returned a verdict in favor of plaintiff for \$1,589.92. When considering the motion for a new trial, filed by defendant, the trial court stated that unless plaintiff filed "a remittitur on this verdict, so as to reduce it down to the sum of \$1,164.50," a new trial would be granted. Thereupon, in open court, plaintiff consented to such remittitur, and judgment was entered for the reduced amount. From this judgment defendant appeals.

It is conceded by the parties that the principal question to be determined in this suit is whether or not the contract of April 3, 1911, is a contract entire or a divisible contract. The determination of this question requires a consideration of the contract of April 3 and the bill of sale of April 26. The latter having been given in compliance with requirements in the former, the two must be construed together in order to determine the rights of the parties.

The contract of April 3 appears to have been carefully drawn. The provisions relating to the sale of the four cars in lot one and the three cars in lot two are separate and distinct and contained in separate paragraphs. It first provides: "That the party of the first part has this day sold, and does hereby sell, to the second party 4 Badger automobiles, being 2 cars of type D, 1 car of type B, and 1 car of type C, all equipped as specified in the first party's catalogue of 1911, and in payment for said cars, the second party has agreed to convey to the first party, as soon as the title papers can be perfected, 200 acres of land in Custer county, Nebraska." Here follows the description of the land. It further provides that the lands will be conveyed by warranty deed, free from all in-

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cumbrances except a mortgage for \$1,300, and interest on the same from the first of the month in which the contract was made; that an abstract is to be furnished, etc.; and that as soon as the deed and abstract are delivered to the first party it will ship one of the cars; and that the four automobiles covered by this sale shall be designated as "lot one." Here we find a separate and distinct sale by defendant to H. E. Wilcox of four cars designated as lot one, in consideration of the conveyance to defendant of 200 acres of land in Custer county, subject to a mortgage for \$1,300.

The next paragraph provides: "It is further agreed that the first party has sold to the second party, and the second party has purchased, and does hereby purchase, from the party of the first part, in addition to lot one, 3 Badger automobiles, to be known and designated as lot two, to be delivered f. o. b. cars at Columbus, Wisconsin, within a reasonable time after being ordered, and on or before September 1, 1911, and that the second party shall pay for the automobiles in lot two the sum of \$1,500 less a 25 per cent. discount per car for type D, and \$1,250, less a discount of 20 per cent. for types B and C." It then provides for an additional discount for all cars which the party of the second part might sell in excess of five cars. Here we have a separate and distinct contract for the sale of three cars under a separate and distinct designation as lot two. It further provides: "It is further mutually agreed, that the second party shall have the option, as to lot two, of designating the number of automobiles he wishes of the three types above named." No such option is anywhere given in the contract as to the types of the cars to be delivered under lot one.

Then come two separate paragraphs of the contract which clearly show: First, how these cars were to be paid for; and, second, how they were to be delivered. The two paragraphs are as follows:

"It is further mutually agreed that all cars, except those in lot one, purchased under this contract, shall be paid

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for before the second party shall be entitled to the possession thereof, and that they shall be shipped with a sight draft attached to the bill of lading.

"It is further mutually agreed that the first shipment shall be one car, as above specified (referring to the one car of lot one which was to be shipped as soon as such deed and abstract are executed and delivered to the first party); that the second shipment shall be two cars of lot one and one car of lot two; that the third shipment shall be one car of lot one and two cars of lot two; that shipments may be ordered by letter or telegram."

The exception in the first of these two paragraphs clearly shows that it was not the intention of the contracting parties that the delivery of the cars in lot one should depend upon the payment for those in lot two, but that all cars "except those in lot one" were to be paid for before the second party should be entitled to the possession thereof. There is no reservation here or anywhere in the contract that delivery of any of the four cars in lot one should depend upon the payment by Wilcox for the cars shipped to him under lot two. The second of the two paragraphs just quoted provides simply for the manner of shipping the last three cars of lot one and the three of lot two. Construing the contract most strongly against the party who prepared it, we construe this paragraph as meaning that the defendant was simply safeguarding itself against a demand for an immediate delivery of all of the cars in lot one, and was reserving to itself the right to ship the last three cars of lot one at the times and in the manner set out in this paragraph of the contract.

The next paragraph of the contract provides: "It is further mutually agreed that the first party shall, upon the delivery to it of the deed and title papers, as hereinbefore provided for said 200 acres of land, execute and deliver to the second party a bill of sale of the four cars, constituting lot one." The next paragraph provides: "That in consideration of the foregoing, and other valu-

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able considerations, the party of the first part has agreed to give, and does hereby give, to the party of the second part, the exclusive right, during the term of this contract, to sell Badger automobiles throughout the state of Nebraska; and also the west half of Iowa, except those counties in Iowa now covered by contract for the sale of Badgers."

The bill of sale is in the usual form of such instruments, and provides: "For and in consideration of the conveyance to it of the (land described) at or before the ensealing and delivery of these presents, by Margaret Mitchell Wilcox and Henry E. Wilcox, her husband, of Omaha, Nebraska, the receipt of which deed of conveyance the said Badger Motor Car Company does hereby acknowledge, has granted, bargained, sold, and by these presents does grant, bargain, and sell to said Margaret Mitchell Wilcox four (4) Badger automobiles, being two cars type D, one car type B, and one car type C, the said automobiles being the ones mentioned and described as lot one in a certain written contract entered into between the vendor and said Henry E. Wilcox, bearing date and executed April 3, 1911, which written contract is here referred to and made a part of this bill of sale, and that this bill of sale is made and given upon the express condition and reservation that the terms of said written contract, and especially the conditions thereof as to the time and manner of delivery of said automobiles, shall be complied with and carried out by the vendee, or by said Henry E. Wilcox; and upon the further express condition and reservation that none of said cars, except the first one, shall be delivered until the vendee, or said Henry E. Wilcox, shall have furnished the vendor satisfactory proof that \$200 has been paid upon the principal of the note and mortgage given by them January 23, 1911, to Claude S. Sidwell upon the lands above described, which mortgage is recorded in book 83 on page 270 in the registry of deeds of Custer county."

It will be seen from this provision in the bill of sale that the conditions and reservations in the contract of

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April 3, subject to which plaintiff took her bill of sale, are described "especially" as those referring to the time and manner of delivery of the automobiles. It contains no reference to any condition in the contract as to payment for the cars in lot two, but provides that none of the cars sold to Mrs. Wilcox in the bill of sale should be delivered until either she or Henry E. Wilcox should furnish the defendant with satisfactory proof that \$200 had been paid upon the principal of the note and mortgage on the Custer county land which it had assumed. Construing this instrument, which was also prepared by defendant, under the rule applied to the contract, it cannot be said that Mrs. Wilcox agreed to be bound by any other conditions in the contract of April 3 except the one as to the time and manner of delivery of the cars. We are unable to see how any construction of the contract and bill of sale other than that given by the learned district court could be sustained. Having reached this conclusion upon the concededly controlling question in the case, we deem it unnecessary to consider any of the other matters argued in the briefs.

Finding no error in the record, the judgment of the district court is

AFFIRMED.

LETTON, J., not sitting.

SEDGWICK, J., dissenting.

The defendant company was engaged in the automobile trade. The object of making the contract was to sell automobiles. They contracted seven automobiles, and were to receive cash for three, and possibly more, if the agency succeeded, and for four they took land. If the land deal was completed they wanted to be sure of the cash sales. The provision in the original contract, that one of the automobiles of lot one for which the land was exchanged should be first shipped, and that thereafter the shipment should be so arranged that the four automobiles for which the land was exchanged should not be delivered before

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the other three were delivered and the contract completed as to them, would, if Mr. Wilcox was seeking to enforce the contract, as to the four automobiles of lot one, enable the defendant to secure payment for the three automobiles of lot two before, or upon, the delivery of the other four automobiles. This seems to have been the understanding of the parties to that contract, since there has been no other reason suggested for such a specification in the contract, except the suggestion in the majority opinion, that the agreement in the contract and in the bill of sale requiring the automobiles sold for cash to be delivered and paid for as soon as the others, was for the purpose of "safeguarding" the defendant "against a demand for an immediate delivery of all of the cars in lot one." Of course, it could not have that effect, as it was left to Mr. Wilcox to order all of the automobiles immediately if he chose. It was immaterial to the defendant whether the four automobiles should become the property of this plaintiff or of Mr. Wilcox. To reserve and make plain the right which the stipulation as to the manner of shipment of the automobiles gave them, it was specifically provided in the bill of sale of the four automobiles that "the time and manner of delivery of said automobiles shall be complied with and carried out by the vendee, or by the said Henry E. Wilcox." The two writings together, so far as Mrs. Wilcox was concerned, constituted her contract, as stated in the majority opinion. The fact that it was especially agreed in the bill of sale that the provision that "the time and manner of delivery of said automobiles" must be observed shows what the parties considered to be the force and effect of that provision of the original contract, which provided that the automobiles for which cash should be paid should be delivered and paid for at or before the delivery of the automobiles of lot one for which the land was exchanged. These provisions of the bill of sale are explicit, and by their terms this plaintiff was not entitled to enforce the delivery of the four automobiles for which she exchanged her land, unless Mr. Wilcox also complied

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with the remainder of the contract by receiving and paying for the other three automobiles.

MORRISSEY, C. J., concurs in this dissent.

SAMUEL NATHAN V. STATE OF NEBRASKA.

FILED DECEMBER 23, 1915. No. 19335.

1. **Intoxicating Liquors; UNLAWFUL POSSESSION; COMPLAINT; RIGHT TO FILE.** Section 3864, Rev. St. 1913, which provides that it shall be a misdemeanor for any person to keep for the purpose of sale without license any malt, spirituous or vinous liquors in the state of Nebraska, does not restrict the filing of a complaint for a violation of such provision to a credible, resident freeholder of the county where such complaint is filed. That restriction relates solely to the obtaining of a search warrant for the purpose of searching the premises of the accused.
2. **Criminal Law; COMPLAINANT AND WITNESSES; EVIDENCE OF MOTIVES; GROUND FOR REVERSAL.** The fact that one who files a complaint against another, charging him with the commission of a crime, is actuated in the filing of such complaint by some ulterior motive, may be shown for the purpose of affecting his credibility; and the same rule will apply as to witnesses in his employ who are called for the purpose of establishing his complaint; but such fact will not excuse the crime of the person complained against, nor will the admission of such testimony be ground for the reversal of a conviction had thereunder, where the court properly charges the jury as to the weight which should be given to such testimony.
3. **Instructions examined, and held to have fully and fairly submitted the case to the jury.**

ERROR to the district court for Washington county:
WILLIAM A. REDICK, JUDGE. *Affirmed.*

G. W. Shields & Sons, for plaintiff in error.

Willis E. Reed, Attorney General, *Charles S. Roe* and *George A. Doll*, *contra.*

FAWCETT, J.

Defendant was convicted in the district court for Washington county on two counts of an information, the first of which charged the sale of intoxicating liquors on June 7, 1914, without having obtained a license so to do, and the second of which charged that on the 7th day of June, 1914, defendant was keeping for purpose of sale without a license intoxicating liquors, commonly called beer. From this conviction defendant prosecutes error.

The errors assigned are: First, that the county court, in which the information was first filed, never obtained jurisdiction of the subject matter, because it did not appear that the complaining witness was a credible, resident freeholder of Washington county at the time he made and filed the complaint; and, second, that the district court did not therefore acquire jurisdiction. The argument in support of these two assignments is based on section 3864, Rev. St. 1913. The section is a long one and will not be set out in full. It first provides that it shall be unlawful for any person to keep for the purpose of sale without license any malt, spirituous, or vinous liquors in the state of Nebraska, and that any person or persons who shall be found in possession of any such liquors, with the intention of disposing of the same without license, "shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined or imprisoned as provided in section twelve of this chapter." It then makes certain exceptions in favor of physicians or druggists, and of liquor kept for sacramental purposes or by persons having the same in their possession for home consumption. It then provides that if any credible, resident freeholder of any county in the state shall, before any police judge, county judge, or justice of the peace, make a sworn complaint in writing that he has reason to believe and does believe that any intoxicating liquor is owned or kept in the county by any person named or described in the information, with the intention to sell the same without license, the magistrate shall, if he believes there is probable cause therefor, issue his war-

rant for the search of the premises described in the complaint. It then defines how the officer shall proceed if upon a search he finds liquor on the premises, and further provides that, in case the place described in the complaint is the residence of the person named in the complaint or of any other person, then and in that case the warrant to search the premises shall not issue unless the complaint shall state that within 30 days immediately preceding the filing thereof liquor has been sold therein in violation of the act. It will be seen from this statement that the provision requiring a complaint to be made by a credible, resident freeholder has no application to a prosecution for a violation of this section of the statute, but relates solely to the obtaining of a search warrant for the purpose of searching the premises of the accused. The prosecution for the violation proceeds, and on conviction the defendant must be fined or imprisoned in the same manner as prosecutions under section 12 of the act which relates to the sale of the liquors named without a license.

The fifth and sixth assignments urge that the prosecution was instituted solely for the purpose, upon the part of the complaining witness, of extorting money from the defendant, and that such prosecution constituted an unlawful use of the criminal arm of the law. These two assignments are based upon evidence of the fact that the complaining witness had an alleged claim against the defendant which he had been trying to collect, but had been unable to do so, and that this prosecution was either for the purpose of frightening the defendant into settling the claim, or for revenge. While we are fully in accord with counsel for defendant in condemning such a course on the part of any one, we cannot hold that it is a defense to a prosecution of the person complained of, where the evidence shows him to be guilty. The ulterior motive of the complainant may be shown for the purpose of affecting his credibility, and the same rule will apply as to witnesses in his employ who are produced by him for the purpose of establishing his complaint; but this improper

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conduct will not excuse the crime of the one complained against, nor will the admission of such testimony be ground for reversal of a conviction had thereunder, where the court properly charges the jury as to the weight which should be given to such testimony. This was clearly done by the trial court in this case.

The third and fourth assignments are that the verdict and judgment are not supported by sufficient evidence and are contrary to law. These assignments rest chiefly upon the fact that the principal testimony was given by the complainant, who was running a detective agency, and by his employees. If no other evidence had been offered, we probably could not disturb the verdict of the jury, who under the law were the judges of the credibility of the witnesses; but the state is not compelled to rely upon the testimony of such witnesses alone. Their testimony is materially corroborated by the witness Kopecky, whose testimony would have been sufficient, standing alone, to sustain the conviction.

We find no error in the record.

AFFIRMED.

LETTON, J., not sitting.

CATHERINE B. MARTINDALE, APPELLANT, v. D. W. GALLADAY
ET AL., APPELLEES.

FILED DECEMBER 23, 1915. No. 18249.

1. **Evidence: PROBATIVE EFFECT.** Physical facts that are so palpable as to amount substantially to demonstration may entirely overcome the testimony of several interested witnesses, especially if they are testifying long after the circumstances to which their testimony relates, and the circumstances, and their manner of testifying, are such as to indicate that they are testifying, not from actual knowledge and recollection of the facts, but from a strong belief and desire to establish such facts.

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2. **Bills and Notes: INDORSEMENT: EVIDENCE.** In this case the plaintiff purchased the notes in suit in good faith and paid full value, and the evidence furnished by the physical condition of the notes in suit, together with plaintiff's evidence and the circumstances proved, overcome the testimony of defendants that the indorsement of transfer of the notes, rendering them negotiable, was not upon the notes when the plaintiff purchased them.

APPEAL from the district court for Boyd county: R. R. DICKSON, JUDGE. *Reversed.*

W. T. Wills and DeBord, Fradenburg & Van Orsdel, for appellant.

John A. Davies and M. F. Harrington, contra.

SEDGWICK, J.

The plaintiff brought this action in the district court for Boyd county upon three promissory notes. The defendants answered, alleging that the notes were obtained by fraud. The plaintiff replied "that the plaintiff is an innocent purchaser and holder of said notes; that she purchased the said notes of Champlin Brothers, the payees of said notes, on Jan. 13, 1904, and on said date paid full value therefor to said Champlin Brothers, to wit, the full amount of principal and interest accrued to said date upon said notes; that she purchased the same in good faith in the regular course of business before the maturity of said notes, without notice or knowledge of any defense thereto or of any equities between the makers or any of them and the payees of said notes, and without notice or knowledge that any claim was made by any one that any such defense or equities existed." The court submitted to the jury the question of fraud in the notes, and also gave the jury the following instructions:

(4) "If you find that the plaintiff has established, by a preponderance of the evidence, that at the time she purchased, paid for, and received the notes in suit from Champlin Brothers, that the indorsement now appearing on said notes, 'Pay to the order of Catherine B. Martindale without recourse on us, Champlin Brothers,' was upon

each of the notes in suit, you will find for the plaintiff for the sum of \$2,390."

(5) "If you find from the evidence that the indorsements now appearing on each of the notes, 'Pay to the order of Catherine B. Martindale without recourse on us, Champlin Brothers', was not upon the notes when the plaintiff purchased, paid for, and received them, the defendants can interpose any defense against said notes they had against Champlin Brothers."

There was a verdict and judgment for the defendants, and the plaintiff has appealed.

The plaintiff contends that the court should have instructed the jury to find for the plaintiff because the evidence establishes that at the time the plaintiff purchased the notes the indorsement stated in instruction No. 4 was entered upon the notes and duly signed by Champlin Brothers. The plaintiff also contends that instruction No. 5 is erroneous because, if the indorsement mentioned therein was placed upon the notes any time before the maturity thereof, the plaintiff was an innocent purchaser; that the notes were fraudulent and subject to defense in the hands of Champlin Brothers, the real payees, is conceded for the purposes of this appeal.

The plaintiff personally had nothing to do with the transaction of the purchase of these notes. Doctor Martindale, her husband, transacted the business for her, and he in turn relied upon their attorney, Mr. Skinner, a practicing lawyer at Clinton, Iowa. The plaintiff took the evidence of herself and her husband and Mr. Skinner by deposition. It did not appear whether the plaintiff herself saw the notes at the time or soon after their purchase. She was not asked whether the indorsement and transfer of the notes signed by Champlin Brothers was on the notes at the time of the purchase, neither was her husband asked that question. Mr. Skinner, who transacted the business for them, testified positively that he wrote the indorsements upon the three several notes respectively, and that they were signed by Champlin Brothers at the time they

were purchased. The notes were executed by each of nine defendants on the 30th day of October, 1903. The notes became due July 1, 1905, 1906, and 1907, respectively. Five of these defendants testified that they saw these notes at the bank in Naper in July, 1905, and that at that time the indorsement of transfer signed by Champlin Brothers was not upon the notes. It is conceded that, if the notes were indorsed when purchased by the plaintiff so as to then be negotiable, the plaintiff is an innocent purchaser, and as such is entitled to recover upon the notes. If the indorsement of transfer was not upon the notes in July, 1905, it cannot be determined from this evidence when it was made, and it might in such case be found that the plaintiff is not an innocent purchaser of the notes.

The question thus presented is of the highest importance and frequently presents difficulties of solution. If our laws do not protect commercial paper negotiated in the regular course of business, our financial transactions will be embarrassed to the great injury of those enterprises which depend upon their credit in the business world. On the other hand, to permit fraudulent practices to succeed by pretended transfers to confederates in fraud is at least equally as injurious to legitimate business. To guard against these evils, the law has provided regulations and means to assist in determining the good faith of the holders of commercial paper which in other business relations might appear quite technical. There were many signers of the notes, and the paper on which they appear is of unusual dimensions both in length and width. As they now appear, they have been folded lengthwise so as to inclose the face of the notes respectively. Payments were made thereon by some of the makers, each apparently acting for himself in making such payment. Three several payments were made on each of the notes, and indorsed as of the date of the execution of the notes. These indorsements are written at full length entirely across the back of each note, as close to the end of the note as conveniently practicable, evidently before the notes had been folded. Then

follows the indorsement of transfer: "Pay to the order of Catherine B. Martindale without recourse on us. Champlin Brothers." This indorsement is written entirely across the notes, as it would naturally have been written if the notes were not folded. The signature of "Champlin Brothers," is immediately below the indorsement, and entirely to the right of the fold in the paper. This indorsement of transfer is written in the same bold hand and occupies a considerable space on each of the notes. Below these indorsements are impressions of rubber stamps which occupy substantially all of the remaining space to the right of the fold in the note. On July 1, 1905, the day the first note became due, five different signers made payments on that note, each payment being \$86.51. These payments are indorsed on the left of the fold, and immediately under, and as close as practicable to the indorsement of the transfer, and to each other. Under each of these indorsements an ink line is drawn. Three of these lines extend beyond the indorsements, and somewhat beyond the fold in the note. If this indorsement of transfer was not placed on this note after the indorsements of the payments of July, 1905, as testified by defendants, it was placed thereon at the time of the purchase of the note, as testified by plaintiff's witness. There is no other evidence fixing the time. The evidence that it is in the handwriting of plaintiff's agent who purchased the notes for her is uncontradicted. If it was not upon the note when the indorsements of July, 1905, were made, why was a blank space of two and one-half or three inches left between those indorsements and the prior indorsement of October, 1903, and the later indorsements crowded as closely together as possible to economize room? No explanation is attempted. The evidence that the indorsement of transfer was made before the indorsements of payment which follow it in form upon the notes, which is most discussed in the briefs, is derived from the appearance of the notes themselves. The transfer indorsement is written across the entire back of the notes, and upon each note two words of this in-

dorsement are across the fold in the note. The appearance of these lines over the fold is such that it may be said to be impossible that they were written after the fold had broken the fiber of the paper. The lines drawn between the indorsements of July, 1905, which extend somewhat over the fold, are blurred at the fold, so much so as to furnish strong proof that when those lines were drawn the fiber of the paper had been so broken by the fold as to absorb the ink along the fold of the paper, and that the paper had become much more broken by the fold than it was when the transfer indorsement was made. If the effect of this fold upon these lines was so palpable as to amount to a demonstration of that fact, it would of itself be decisive of this appeal.

"A document or a part of a document is sometimes proved to be fraudulent if it can be conclusively shown that a part of the writing preceded and a part followed the folding of the paper. An ink line crossing a fold has certain definite characteristics, but such a line may not be more than one one-hundredth of an inch in width, and the unaided eye may not be able to see the physical evidence of the fact which under the microscope is so plain that it cannot be denied. A tiny portion of the ink in such case may actually have gone through the paper to the opposite side, and under the microscope this fact is unmistakable." Osborn, *Questioned Documents*, p. 73.

The appearance of these lines under a magnifying glass, together with the relative location and form of all of the indorsements on the notes, establish that the indorsements of payment of July, 1905, were made after the transfer indorsement, and entirely overcome the evidence of defendants upon that point. The fact being established that the indorsement of transfer was before July, 1905, it must have been at the time of the purchase of the notes. Plaintiff's evidence to that effect is not contradicted, except by the attempt to prove that it was not on the notes in July, 1905.

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As before stated, each one of five of these defendants testified that he saw these notes in July, 1905, and that at that time the indorsements of transfer were not upon the notes. In determining the force of this testimony, we may consider the interest of these parties in the result of the litigation; that six years had elapsed since they made these payments; the circumstances under which they saw the notes at that time, and other circumstances connected with their testimony. It appears from their evidence that they had not seen the notes from the time they were signed in October, 1903, until they made these payments on the first of July, 1905; that when they made these payments the president of the bank, who was not called as a witness, showed them the notes through the window over the counter in the bank. On the evening before they testified, they were at the office of their attorney and were shown the notes by him, and apparently agreed that this transfer indorsement was not upon the notes when they made these payments in July, 1905. When they were called to the stand to testify, they were not asked to state the condition of the notes at the time they refer to, but each of them was asked a somewhat leading question in substantially the following form: "Q. I call your attention to the note marked Exhibit '5'. When you saw that note in July, 1905, at the bank of Naper, you may state whether there was written on that note at that time these words: 'Jan. 13, 1904, pay to the order of Catherine B. Martindale without recourse on us. Champlin Brothers.' A. No, sir. Q. Was the name of Champlin Brothers there? A. No, sir." One of these witnesses was asked upon cross-examination: "Q. Mr. Briggs, at the time you saw these notes in July, 1905, you knew that they were then in Martindale's possession, did you not? A. No, sir. Q. Hadn't you ever heard of Martindale up to that time? A. I don't think so. * * * Q. Didn't you hear that Martindale had these notes? A. Not to my recollection. Q. When did you first learn that the Martindales were connected with these

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notes? A. I couldn't say the year. Q. What is your best impression as to the time? A. I think it was some time when the second note became due. Q. But up to July, 1905, when the first note became due, you had never heard anything about the Martindales in connection with these notes, or otherwise? A. Not to my recollection." He was then shown a letter which he wrote to Mr. Martindale December 15, 1904, while Mr. Martindale was considering the advisability of purchasing the notes, in which letter the witness acknowledged the receipt of a letter from Mr. Martindale dated December 13, 1904, and in which the witness wrote Mr. Martindale: "We are of the opinion that your note was given payable on July 1, 1905, and that there was no interest due until that time, now you have a good note and it will be paid as soon as the company can get to it. * * * We are all very well satisfied to have you leave the note at the Bank of Naper." He then admitted that he wrote the letter, and that he received from Mr. Martindale the letter referred to therein. He was then asked: "Q. Now, did you see the note in the bank of Naper in December, 1904? A. According to that letter, I did." No doubt this witness believed what he testified to. He was testifying from recollection to matters that had taken place six or seven years previously. He had been led to fully believe by the strong representation of his codefendants that the transfer indorsement was not upon the note when he saw it six years before, and was made to understand that to establish that fact would win his case; and, being asked upon the witness stand only the question which called for an explicit answer "yes" or "no," he answered according to his understanding and belief, and without having testified that he had any certain knowledge in regard to it. These observations apply equally to the other defendants who so testified. Such testimony amounts to an expression of strong belief of a circumstance which would win his case, and cannot overthrow physical facts which amount to a substantial demonstration.

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The judgment of the district court is reversed and the cause remanded.

REVERSED.

MORRISSEY, C. J., dissenting.

HAMER, J., not sitting.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE AND CROSS-APPELLANT, v. BOX BUTTE COUNTY, APPELLANT AND CROSS-APPELLEE.

FILED DECEMBER 23, 1915. No. 18427.

1. **Appeal: BRIEFS: STATEMENT OF EVIDENCE.** Upon appeal the statement in the briefs of the substance of the evidence bearing upon a question of fact necessary to the determination of the case "will be taken to be accurate and sufficient for a full understanding of the questions presented for decision, unless the opposite party in his brief shall deny the correctness or accuracy of the statement, specifying with particularity the defects and inaccuracies therein, with citation of the page and paragraph of the transcript or page and question of the bill of exceptions, as the case may be, relied upon by him in support of his contentions in that regard." Supreme Court Rule 12 (94 Neb. XI).
2. **Taxation: RAILROAD PROPERTY: ASSESSMENT.** The expression "right of way and depot grounds" in section 6375, Rev. St. 1913, was not intended to exclude from the jurisdiction of the state board in assessing railroads all property situated more than 100 feet from the center of the main track of the road.
3. ———: ———: ———. A railroad, for the purpose of assessment and taxation, is considered as an entity, and includes all property that is held and used principally in the operation of the road and carrying on the business of transportation.
4. ———: ———: ———. The state board of equalization in assessing a railroad acts in a quasi-judicial capacity. In doubtful cases its determination as to whether a particular article of property is a part of the railroad entity is to be considered by local assessors.
5. ———: ———: ———. The construction in *Adams County v. Kansas City & O. R. Co.*, 71 Neb. 549, of that part of the revenue

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law (Rev. St. 1913, sec. 6375) which specifies property to be assessed locally is adhered to.

6. ———: ———: ———. A large quantity of steel rails not shown to be intended for repair of the road in this state and not assessed by the state board may be assessed locally.
7. ———: ———: ———. Eleven miles of fence on leased land not assessed by the state board may also be locally assessed.

APPEAL from the district court for Box Butte county:
WILLIAM H. WESTOVER, JUDGE, *Affirmed.*

Lee Basye and Burkett, Wilson & Brown, for appellant.

Byron Clark, Jesse L. Root and F. A. Wright, contra.

SEDGWICK, J.

The Chicago, Burlington & Quincy Railroad Company is a corporation operating a railroad throughout this and adjoining states, a line of its road extending through Box Butte county and the city of Alliance, a division city on this line. It made a return of its property to the state board of equalization of assessment, which was duly assessed by that board. The local authorities in Box Butte county assessed certain items of property which had been so assessed by the state board, and from the action of the local board of equalization thereon the railroad company appealed to the district court for that county. Upon trial in that court the action of the board of equalization was affirmed in part and reversed in part, and the railroad company and the county have both appealed to this court.

The attorneys for the county say in their brief: "The disposition of this case seems to turn upon the definition of 'right of way' used in the statute." They also quote the following stipulation from the record. "It is stipulated between the parties hereto that all of the property included in the assessment to which the plaintiff is objecting is situated more than 100 feet from the main track of the plaintiff company's railroad, and that it is south of the main track." They also quote another stipulation which

relates only to an article which the district court found should be assessed locally, and then say: "These two stipulations set at rest the question of the location of this property, and settle beyond doubt that the property included in the assessment of the local authorities was located beyond the right of way, that is, more than 100 feet from the center line of the main track, and it appears from the testimony of the engineer that the right of way of this appellee is 200 feet wide, 100 feet on each side of the center of the track, or less." The attorneys for the railroad company quote from the record testimony of the general superintendent of the company and another witness that the land on which the property in controversy was located at the time of the assessment was then, and had been for many years, used by the company for station and depot grounds; that it was purchased for that purpose and had always been so used. The brief of the county does not deny that all of the property that was by the district court found to be a part of the railroad entity and should be properly assessed by the state board was and is located on the depot grounds, and that the buildings, yards and barns involved are all served by side and spur tracks; so that the contention of the county seems to be that under no circumstances can the right of way extend more than 100 feet from the center of the main track, and that property not on this right of way must be locally assessed.

In 1869 the legislature provided for the assessment of railroad property by the state board of equalization. Laws 1869, p. 179, sec. 17. By this act, as amended (Gen. St. 1873, ch. 66, sec. 17), the state board was required to assess "roadbed, superstructure, right of way, rolling stock, side track, telegraph lines, furniture and fixtures, and personal property belonging to such corporation." This statute was several times construed by this court, and also amended from time to time. As amended in 1881 (Laws 1881, ch. 70, sec. 1) the statute required the report to the state board of assessment to state: "The number of miles of such railroad and telegraph line in each organized county

in the state, and the total number of miles in the state including the roadbed, right of way and superstructures thereon, main and side tracks, depot buildings and depot grounds, section and tool houses, rolling stock and personal property necessary for the construction, repairs or successful operation of such railroad and telegraph lines: Provided, however, that all machine and repair shops, general office buildings, storehouses, and also all real and personal property outside of said right of way and depot grounds as aforesaid, of and belonging to any such railroad and telegraph companies, shall be listed for purposes of taxation" by the county assessors. The general purpose of this legislation is stated in *State v. Savage*, 65 Neb. 714, 750, as follows: "It seems reasonably clear that in assessing railroad and telegraph property, as contemplated by sections 39 and 40, the whole property belonging to any one corporation, and subject to assessment in this state, should be valued for tax purposes in its entirety, and that in such valuation should be included all elements going to make up the entire property, whether consisting of franchises or other intangible property, or physical property, be it real, personal or mixed." It is explained somewhat more at large in *Chicago, B. & Q. R. Co. v. Richardson County*, 72 Neb. 482: "If the railroad is an entity, we have one piece of property, spreading over several counties; if that portion within each county is a separate entity, then a valuation of such separate entity should be made in each county, as in other cases. * * * If the road as a whole is valued correctly, the several portions in each county cannot fail to be justly valued when assessed at the proportion they bear to the whole." Apparently each successive amendment of the statute makes this purpose of the legislature more plain. The final amendments by which this action is to be determined were made in 1903 and 1909. Laws 1903, ch. 73, p. 413; Laws 1909, ch. 111, p. 441; Rev. St. 1913, secs. 6374-6386.

Section 6374 provides: "The property of railroads, railroad corporations and car companies shall be annually as-

sessed as prescribed in this article by the state board of equalization and assessment."

Section 6375 provides: "The state board of equalization and assessment is hereby empowered, and it is made its duty, to assess all property of the railroads and railroad corporations in the state of Nebraska: Provided, however, all machine repair shops, general office buildings, storehouses, and also all real and personal property outside of right of way and depot grounds as of and belonging to any such railroad and telegraph companies, shall be listed for purposes of taxation by the principal officers or agents of such companies with the assessors of any precinct of the county where such real or personal property may be situated, in the manner provided by law for the listing and valuation of real and personal property."

Section 6376 provides: The state board shall "ascertain all property of any railroad company owning, operating or controlling any railroad or railroad service in this state, which, for the purpose of assessment and taxation, shall be held to include the main track, side track, spur tracks, warehouse tracks, road bed, right of way and depot grounds, and all water and fuel stations, buildings and superstructures thereon, and all machinery, rolling stock, telegraph lines and instruments connected therewith, all material on hand and supplies provided for operating and carrying on the business of such road, in whole or in part, together with the moneys, credits, franchises and all other property of such railroad company used or held for the purpose of operating its road."

Section 6377 requires the company to "return to the state board of equalization and assessment a sworn statement or schedule of the property of such company." This statement or schedule it provides shall include: "Third—a complete list giving size, location as to county, township and city and village, material and value of all depots, station houses, machine shops, stock yards, scales or other buildings situated wholly or in part on the right of way,

together with all platforms, fuel and water stations, and the machinery and tanks connected therewith."

It will be noticed that section 6375 is the only section specifying property to be assessed by the local authorities, and the language of this section in that regard, as amended in 1909 (Laws 1909, ch. 111, p. 441), is the same as in the corresponding section of the act of 1881, except that as published it omits the word "and" in the phrase "all machine and repair shops." This omission of the word "and" is of little importance, since the history of this legislation shows that such omission was an oversight. The word is in the enrolled and authenticated bill of the act of 1903, filed in the office of the secretary of state, but was, by mistake, omitted from the act as published. This omission evidently led to the same omission in the amendment of 1909. Section 6376 specifies the property of the railroad company which shall be included for the purpose of assessment by the state board, and it includes "the main track, side track, spur tracks, warehouse tracks, road bed, right of way and depot grounds." The railroad for the purpose of assessment and taxation is considered as a whole. The reason for treating it as an entity is stated in the opinion of Mr. Commissioner Pound in *Chicago, B. & Q. R. Co. v. Richardson County*, *supra*. Its business being the transporting of persons and property, the entity so to be assessed includes all property that is held and used principally in carrying on such business. The difficulty in the case is in determining what property is held and used for such purpose. In *State v. State Board of Equalization*, 81 Neb. 139, it is said that the state board "acts in a quasi-judicial capacity." In *Chicago, B. & Q. R. Co. v. Merrick County*, 36 Neb. 176, the trial court found specially that the property involved was not returned by the railroad company to the state board for assessment, and that it was not assessed by the state board. The court said in the opinion that the principal complaint of the plaintiff was that the evidence did not support that finding, and "that the presumption is that the state board

assessed the property in question, hence it is liable to double taxation thereon. * * * Did the plaintiff return the property in question to the state board? If it did, the return will show. If it did not, it has no cause of complaint. The revenue law of this state is designed to make a fair and just apportionment of taxes upon all the taxable property of the state whether the owner be a wealthy corporation or a person of but little means. There is no complaint that the property is assessed too high or that the tax itself is unjust if the property has not already been assessed by the state board. The proof fails to show that it was so assessed."

It is not the policy of the law to create dissensions or difference of views of jurisdiction or to cause double or conflicting assessments. Some articles of property are plainly assessable by the state board; others are as plainly subject to local assessment. There are articles of property in regard to which it is not so easy to determine whether they should be assessed locally or are within the jurisdiction of the state board as part of the railroad entity. If these doubtful cases are determined by local assessors, there will be a variety of conclusions and no uniformity and no equality between different localities. The state board, with the assistance of its experts, is better qualified to determine what articles of property are essentially a part of the railroad, and there is no doubt that some consideration should be given to its action in the matter. If it declines to assess an article of property as not being a part of the railroad, the local assessor may well assume that it falls within his jurisdiction. If it assesses property as a part of the railroad entity, local assessors may well assume, in doubtful cases, that such property has been properly assessed.

It seldom happens that a common expression has received such diverse construction and application, depending upon the particular circumstances of its use, as has the expression "right of way." Even when the right of way of a railroad company is defined, we find a great variety of

construction, depending upon the connection in which it is used. The supreme court of the United States in *St. Louis, K. C. & C. R. Co. v. Wabash R. Co.*, 217 U. S. 247, adopted the definition of the term "right of way" of the circuit court of appeals in the same case, as follows: "The ordinary signification of the term 'right of way,' when used to describe land which a railroad corporation owns or is entitled to use for railroad purposes, is the entire strip or tract it owns or is entitled to use for this purpose, and not any specific or limited part thereof upon which its main track or other specified improvements are located. *Joy v. St. Louis*, 138 U. S. 1; *New Mexico v. United States Trust Co.*, 172 U. S. 171, 174 U. S. 545; *Chicago & A. R. Co. v. People*, 98 Ill. 350; *Lake Erie & W. R. Co. v. Middlecoff*, 150 Ill. 27; *Pfaff v. Terre Haute & I. R. Co.*, 108 Ind. 144."

In view of the general purpose of our statute that the state board shall assess the railroad as an entity, including all of its property used in operating its road or carrying on the business of such road, and considering the language used in other sections of the statute, it seems clear that the words "right of way and depot grounds," as they are used in section 6375, could not have been intended to exclude from the jurisdiction of the state board all property situated more than 100 feet from the center of the main track of the road. The brief of appellant rests entirely upon this proposition. It offers us no assistance upon any other theory of the case. As this theory fails, and we have not observed any plain error which requires a reversal upon any other theory, we must hold that the appeal of the county is without merit.

The railroad company suggests a question as to the construction of that part of section 6375 which specifies property to be assessed locally: "All machine and repair shops, general office buildings, storehouses, and also all real and personal property, outside of right of way and depot grounds." This provision was construed in *Adams County v. Kansas City & O. R. Co.*, 71 Neb. 549, in which it was said: "The plaintiff contends that each of the

terms used in the proviso, to designate the different classes of property, is qualified by the phrase, 'outside of said right of way.' * * * Had the legislature thus intended, it is not likely they would have followed a specific enumeration by general terms sufficiently comprehensive to include all the preceding terms. * * * Besides, from the word 'also,' following the conjunctive, and the repetition of the collective 'all,' it is clear, we think, that the phrase, 'outside of said right of way,' was intended to qualify only the word 'property' immediately preceding it." We do not feel justified in departing from this construction of the statute.

The district court decided that 12,938 steel rails, valued at \$97,020, and 11 miles of fence on leased land should be assessed locally. These rails and fence, it is contended, should have been assessed by the state board. In *Chicago, B. & Q. R. Co. v. Merrick County, supra*, it was decided that "material for the construction of a railroad which was piled up near Central City and had so remained for a long time * * * was taxable" by the local assessor. It is not clear that these rails were on hand for the repair of the road in this state, and we cannot say that the assessing authorities and the district court have erred in this regard. The fence, being on leased lands, and not having been assessed by the state board, was properly assessed locally.

We have not found any error in the judgment of the district court requiring reversal, and it is therefore

AFFIRMED.

FAWCETT, J., not sitting.

**BASKET STORES OF LINCOLN, NEBRASKA, APPELLEE, v.
FRANK S. ALLEN ET AL., APPELLANTS.**

FILED DECEMBER 23, 1915. No. 18449.

1. **Trade-Names: INFRINGEMENT.** It is an infringement on a legally acquired trade-name to use, in the same locality and in the same line of business, another name of such similar import that the ordinary attention of persons would not disclose the difference between the two names.
2. **Trade-Marks: INFRINGEMENT: INJUNCTION.** When the owner of a trade-mark applies for an injunction to restrain a competitor from injuring his property by making false representations to the public, it is essential that the complainant and the defendant should both be engaged in the sale of the same kind of goods.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

R. H. Hagelin, for appellants.

Sterling F. Mutz, contra.

HAMER, J.

The plaintiff, a corporation, seeks to enjoin the defendants, Frank S. Allen and Ida Ford, from doing business under the firm name of "The Basket Store." Plaintiff alleges that its place of business is at 1020 P street. It is conducting eight stores in Lincoln. They are described in the plaintiff's petition as "Basket Store" No. 1; "Basket Store" No. 2; "Basket Store" No. 3; "Basket Store" No. 4; "Basket Store" No. 5; "Basket Store" No. 6; "Basket Store" No. 7; "Basket Store" No. 8. Plaintiff alleges that it has been continuously in the business of buying and selling groceries and meats at retail since the 18th day of March, 1908, and that it has used for its trade-name at the several places of business, which it names in its petition, the words "Basket Store," that the scope of territory in which the plaintiff does business includes all the city of Lincoln, University Place, Havelock, College View,

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Bethany and West Lincoln, with contiguous territory in Lancaster county on all sides of the said cities and villages and for a distance of several miles into the country. Plaintiff claims that it is entitled to the exclusive use of the name "Basket Store" in its business in said territory and without interference; that the plaintiff has built up a large and prosperous business and has spent large sums of money in advertising and putting the name "Basket Store" before the public; that the public became acquainted with the plaintiff through the use of the trade-name "Basket Store," as also the reputation of the plaintiff for low prices when compared with other stores; that the defendants, knowing these facts, on the 15th day of June, 1912, fraudulently and unlawfully commenced to use the plaintiff's said name "Basket Store" in the grocery business in University Place, and within the territory in which the plaintiff does business; that, by virtue of the use of said name by the defendants, the public and the plaintiff's customers have been deceived and have been led to believe that they are dealing with the plaintiff, when in fact they are dealing with the defendants; that the use of said name by the defendants is unfair to the plaintiff, and is taking advantage of the plaintiff's extensive advertising of its business, and that the plaintiff has thereby lost many customers and is still losing them; that the plaintiff has been damaged by the loss of said customers and by the loss of profits and by the loss of the value of its advertising; that the plaintiff has repeatedly requested the defendants to refrain from using the said name in their said business, but they refused to do so and are still using said name; that, by virtue of the continuing nature of the injury and damage to the plaintiff, there is no adequate remedy at law, and that, if there was a remedy at law, the same would involve a multiplicity of suits, and would be uncertain, protracted and of no value. The prayer to the original petition is that the defendants be forever enjoined from using the name "Basket Store" in connection with the grocery and meat business which they conduct in University Place and

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within the territory in which the plaintiff does business. The defendants in their answer claim to be conducting a store in the city of University Place, known as a "Basket Store," that University Place is a separate and distinct municipality from that of the city of Lincoln, and that said cities are five miles apart; that what the defendants did was done in good faith, and without any intention to injure or defraud the plaintiff. The case came on for trial on the 7th day of July, 1913, whereupon it was adjudged that the plaintiff is entitled to the exclusive use of the name "The Basket Store" within the territory named in the petition, and that the defendants be forever enjoined from using the said name in connection with their said grocery and meat business in University Place, Nebraska, and that the defendants pay the costs. From this judgment the defendants appeal.

An examination of the evidence would seem to show that the plaintiff's business has become valuable by reason of the fact that the purchaser of goods is attracted by the method of doing business and the financial advantage which may result to him. He is likely to say to himself that, if he goes and pays cash at that kind of a store for such goods as he can purchase, he will get the goods for less than their retail price; that other persons who buy there will get the goods which they purchase at less than the retail price; that one of the reasons that he will get the goods at less than the retail price is because, where the store is a basket store, it does not carry the goods to the home of the purchaser. He carries the goods himself, or procures a method of transfer. The purchaser may say to himself, so long as I deal at the basket store, I will get the goods for a less price by reason of the fact that the store is not put to the expense of carrying goods over a wide expanse of territory and to many purchasers, some of whom never pay. A basket store sells strictly for cash. There is, therefore, no loss by reason of failure to collect. Also, it may be said that the quality of the goods will be

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much improved by reason of the fact that large quantities will be sold, and that they will always be fresh.

The use of the descriptive words may not be defended upon the ground that they constitute a trade-mark; at the same time it would seem to be unfair that one may obtain the business of another when the chief value in such business is the name. The plaintiff, with his eight stores of the same name, has built up a large and prosperous business, as it appears from the evidence. If the defendants seek to take advantage of the name under which the plaintiff has been doing business, it is, to say the least, unfair. If theirs is a good store, they can build up a reputation of their own.

In the case of *Miskell v. Prokop*, 58 Neb. 628, this court held that a trade-name might be acquired. The first paragraph of the syllabus reads: "A right to the exclusive use in the particular locality of a trade-name or a sign may be acquired." In that case, however, the judgment was for the defendant. The controversy was about the right to use the term "Racket Store." The defendant conducted its business under the name "New York Racket Store." This court held that there was a distinction between "New York Racket Store" and "Racket Store," and that a careful examination of the words would prevent the public from being deceived. This court said: "In the present case we think the question upon which the decision must turn is, was the defendant's sign, taken as a whole, such a simulation of that of the plaintiff as to work the mischief attributed to it, or well calculated to so do?" The doctrine is clearly laid down, however, that there is no right to deceive the public or to injure a merchant by the adoption of the peculiar name under which he does business. See *Beebe v. Tollerton & Stetson Co.*, 117 Ia. 593.

In *Regent Shoe Mfg. Co. v. Haaker*, 75, Neb. 426, this court held that, where a mercantile company has acquired a trade-name in a particular locality, it is entitled to protection against unfair competition in its particular line

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of business by the use by a competitor of a name of such similar import as to probably deceive the public.

We are unable to discover a sufficient reason for setting aside the judgment of the district court in favor of the plaintiff. The judgment of the district court is

AFFIRMED.

LETTON and SEDGWICK, JJ., not sitting.

JAMES T. MASON V. STATE OF NEBRASKA.

FILED DECEMBER 23, 1915. No. 19049.

1. **False Pretenses: EVIDENCE.** Where the prosecution in a criminal case was under section 8874, Rev. St. 1913, and the information alleged that the defendant executed and delivered a chattel mortgage to a certain bank for the purpose of cheating and defrauding the same, and it appears that the defendant had obtained the credit before that time, except the sum of \$14, and that the last mortgage given was a renewal, the evidence is not sufficient to establish the commission of a felony, and does not tend to prove an offense greater than a misdemeanor.
2. ———: **AMOUNT INVOLVED: PENALTY.** In such case, where the evidence shows that the defendant only got \$14 in cash from the bank at the time of the transaction, and that the mortgage given is a renewal, except as to the said sum of \$14, it will be held that the defendant may not be found guilty of a felony, and, at most, can only be guilty of fraudulently obtaining the \$14, and so, under the section, if guilty, is only guilty of a misdemeanor, and can only be fined not exceeding \$100, or be imprisoned in the jail of the county not exceeding 30 days, all as is provided by said section 8874, Rev. St. 1913.
3. ———. Where the defendant received only \$14 in money at the time of the renewal when the chattel mortgage was made, and the bank at Crawford undertook to pay a coupon held by the bank at Fremont, and amounting to the sum of \$188, and failed or refused to do so, there can be no indebtedness of the defendant for the \$14 that he received because he is entitled to have the bank at Crawford pay the coupon at Fremont, and \$14 is not sufficient to pay said coupon, and the payment of that sum to the defendant

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would leave the bank at Crawford indebted to him for the difference between \$14 and \$188, being \$174.

4. ———: SUFFICIENCY OF EVIDENCE. Where the evidence shows that the cashier of the bank alleged to have been defrauded told the defendant that he wanted him to pay up, that the paper had run over a long series of years and the directors were not satisfied to renew, and this and other evidence tends to show that the cashier of the bank did not believe that the defendant had the live stock described in the mortgage, then it must follow that the cashier was not deceived and did not rely upon the security of the mortgage. In that event, the evidence is insufficient to sustain a verdict of guilty of a felony or a misdemeanor.

ERROR to the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Reversed and dismissed.*

Earl McDowell, Allen G. Fisher and William P. Rooney,
for plaintiff in error.

Willis E. Reed, Attorney General, and Charles S. Roe,
contra.

HAMER, J.

The plaintiff in error will be called the defendant. The charge against him is that he is guilty of false pretenses because he obtained a credit with the First National Bank of Crawford, Nebraska, for \$4,560 on alleged fraudulent statements touching his ownership of cattle and horses in Sioux county, Nebraska. The defendant was tried in the district court for Dawes county, and the jury rendered a verdict finding him guilty as charged in the information, and found "the value of the money and credit fraudulently secured from the First National Bank to be the sum of \$2,111.10." Upon this verdict the defendant was, on the 2d day of March, 1915, sentenced to the penitentiary at hard labor for an indeterminate period of not less than one nor more than five years. The prosecution is under section 8874, Rev. St. 1913. The part of that section applicable to the case reads as follows: "Whoever by false pretense or pretenses shall obtain from any other person, corporation, association, or partnership, any money, goods,

merchandise, credit or effects whatsoever with intent to cheat or defraud such person, corporation, association, or partnership of the same, or shall sell, lease or transfer any void or pretended patent right or certificate of stock in a pretended corporation and take the promissory note or other valuable thing of such purchaser, * * * if the value of the property or promissory note or written instrument or credit, fraudulently obtained or conveyed as aforesaid, shall be thirty-five dollars or upwards, shall be imprisoned in the penitentiary not more than five years nor less than one year; but if the value of the property be less than thirty-five dollars the person so offending shall be fined in any sum not exceeding one hundred dollars or be imprisoned in the jail of the county not exceeding thirty days and be liable to the party injured in the amount of damage sustained."

The First National Bank of Crawford was the successor of a bank having the same cashier and stockholders. When the first bank went out of existence, the defendant continued to make mortgages and borrow money of the new bank, the First National Bank. He got no money by the transactions described in the information in this case, except \$14. He may have received money before this last transaction because of representations which he made when the debt was contracted, but no new debt was contracted when the mortgage and notes were given which are described in the information, unless it was the \$14. There was already an indebtedness, and therefore, if the transaction was fraudulent, the fraudulent act had already been consummated. Of course, there can be no valid trial and no lawful punishment except for the violation of law charged in the information. The facts fail to show that the defendant requested an extension of the debt, and it is not saying that he requested an extension of the debt to say that he desired to borrow money of the bank to pay what he owed the bank by reason of a former transaction. As he got no money out of the last transaction, there could be no deception at that time, except in

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the matter of obtaining the \$14 which is hereafter referred to.

The cashier of the bank at Crawford testified that there was a real estate mortgage given by the defendant which was held by the bank at Fremont, the Commercial National, or an associate of that bank. The bank at Fremont was the correspondent of the bank at Crawford. The cashier of the bank at Crawford, Mr. Minick, appears to have indorsed the note or notes secured by the said real estate mortgage, and appears to have sent the same down to the bank at Fremont, and there was an interest coupon on this real estate note and mortgage to be paid at the bank at Fremont, amounting to \$188, which the cashier of the bank at Crawford undertook to pay. He, the said cashier of the bank at Crawford, could not rightfully claim that the defendant was indebted to the said bank at Crawford for a transfer of money to pay interest on the said real estate mortgage held by the bank at Fremont when such transfer was not in fact made, and the coupon attached to the real estate note at Fremont was not surrendered to the defendant, but was retained by the bank there against the request of the defendant. If the contention of the defendant concerning the real estate coupon is true, there is no evidence in the case sufficient to convict him of anything. The money to pay the interest coupon was not sent at the time of the transaction, and the defendant insisted that he should have the coupon but Minick did not get him the coupon, and refused at that time to do so. Minick could not keep the coupon in his correspondent's hands at Fremont and yet legally claim that the defendant became indebted to him for the transfer of money to pay interest on the real estate mortgage when such transfer was not made and the coupon was not surrendered. The verdict of the jury finds that the defendant defrauded the bank out of \$2,111.10. So long as the defendant did not receive anything, he could not be guilty of taking anything. The \$14 in money which the defendant got would not pay the coupon. There can be no

indebtedness of the defendant for the \$14 which he received because he is entitled to have the bank at Crawford pay the coupon at Fremont, and \$14 is not sufficient to pay said coupon, and the payment of that sum to the defendant would leave the bank at Crawford indebted to him for the difference between \$14 and \$188, the amount of the coupon, being \$174.

There is a failure to furnish evidence which tends to sustain the information, and such evidence as is furnished wholly fails to support the verdict. As the defendant had contracted the debt before the renewal was made, it follows that the misrepresentations which he made, if any, were when the debt was created, and not when it was renewed. Of course, no evidence was offered showing, or tending to show, that any misrepresentation was made when the loan was first obtained, and under the information it would have been prejudicial error to admit such evidence. There was no charge which in any way related to the making of any loan prior to the renewal. In no event could the defendant be tried except upon the charge contained in the information. As the defendant had the credit when the renewal was made, he did not need to get it again, and of necessity could not get it again. If the defendant got any additional credit when the note was renewed and a new mortgage taken, it was only for \$14. This would make the offense, if any offense was committed, a misdemeanor, and not a felony.

It further appears that the cashier of the bank, Mr. Minick, claimed to the defendant that he, the defendant, did not have the security. Minick so testified. If that is true, then Minick was not deceived, and could not have relied upon any belief that Mason still had the security. Minick testified that he told Mason, "We had been unable to get him to show us the security." The essentials of the crime of obtaining money or property by false pretenses are that the false pretense or pretenses must relate "to a past event or an existing fact," and "any representa-

tion, or assurance, or promise, in relation to a future transaction, however false and fraudulent it may be, is not within the meaning of the statute," and "the misrepresentations must be of a fact, and not a statement of an opinion, or the making of a promise." *Cook v. State*, 71 Neb. 243. Maxwell, Criminal Procedure (2d ed.) p. 129; *Dillingham v. State*, 5 Ohio St. 280; 1 McClain, Criminal Law, sec. 668.

In the case of *State v. Matthews*, 44 Kan. 596, 10 L. R. A. 308, the court held: "The charge of committing the offense of obtaining money or property under false pretenses cannot be maintained in any case unless it appears not only that a false pretense was in fact made, but also that it was made with the intention of cheating or defrauding some person, and that such person was in fact cheated or defrauded to his or her injury." In that case the name of the wrong person cheated and defrauded was put in the information, and the judgment of the district court was reversed for that reason.

The alleged fraud must be proved, and must be relied upon by the plaintiff before damages can be recovered. *Dresher v. Becker*, 88 Neb. 619.

"Fraud cannot be predicated on a promise not performed. To be available there must be a false assertion in regard to some existing matter by which a party is induced to part with his money or property." *Perkins v. Lougee*, 6 Neb. 220.

"In order to obtain redress or relief from the injurious consequences of deceit, it is necessary for the complaining party to prove that his adversary has made a false representation of material facts; that the complaining party was ignorant of its falsity, and believed it to be true; that it was made with intent that it should be acted upon; and that it was acted upon by the complaining party to his damage." *Omaha Electric Light & Power Co. v. Union Fuel Co.*, 88 Neb. 423.

"It is a general rule of law that, in order to obtain redress or relief from the injurious consequences of deceit,

it is necessary for the complaining party to prove that his adversary has made a false representation of material facts; that he made it with knowledge of its falsity; that the complaining party was ignorant of its falsity, and believed it to be true; that it was made with intent that it should be acted upon; and that it was acted upon by the complaining party to his damage." 1 Bigelow. Fraud, p. 3.

It will be noticed that the act done must be done "with the intent to cheat or defraud;" because of the necessity of knowledge on the part of the defendant, it must be proved that he knew, or had reason to know, that he did not have the property at the time he undertook to make the mortgage. There is no proof of that given in this case.

Because the evidence does not tend to sustain the information and wholly fails to support the verdict, the judgment of the district court is reversed and the case dismissed.

REVERSED AND DISMISSED.

SEDGWICK, J., concurring.

The information in this case is, I think, wholly insufficient in several particulars to inform the defendant what proof he might expect would be offered against him, or what evidence it would require him to furnish in his defense. An information for obtaining money, goods, merchandise, credits, or effects by false pretense or pretenses must specify and describe the things so obtained in such manner that the defendant may definitely know the charge against him and prepare to produce such evidence as may exist in refutation of the charge. The information charges that the defendant was then indebted to the bank, but in what amount it is not alleged. It also charges that he was desirous of obtaining credit from the bank with which to discharge his indebtedness. The things that he did for which he was prosecuted were done for the purpose of enabling him to procure such credit "and divers sums of money from time to time advanced to him by said bank." It does not appear from the information whether

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these divers sums of money were advanced after or before the representations were made. He applied to the bank "for credit and money in said sum." No sum of money had been before that named in the information, so that it is entirely indefinite as to how much credit or what sum of money was applied for. The bank agreed to give the defendant "credit and money in said sum," no sum having been named in the information, so that it is entirely indefinite as to what amount of money or credit, or both, the bank agreed to give him. Then follows the allegation that the bank received a mortgage from him in the sum of \$4,560, "and did give to the said James T. Mason moneys and credits in said sum * * * of the value of forty-five hundred and sixty dollars." It is not alleged that this money and credit was the property of the bank, and it is not alleged how much of this was money and how much was credit. The credit that the defendant desired, and the credit which he obtained, is not at all defined in the information. The implication is that the amount of money and credits which he received were represented in the mortgage of \$4,560. This mortgage, it is alleged, is given to secure notes. There is no allegation as to the number of the notes nor the amounts of them, respectively, and it does not appear whether they were given on demand, on one day's time, or upon a longer time. It is impossible to tell from the information what the nature of the credits might be. There is no allegation of any specific amount of money that the defendant obtained, nor when he obtained such amount. It may be that these defects in the information were not seasonably challenged, but an information of this nature, that fails wholly to describe or in any way identify the property obtained by the alleged fraudulent pretenses, is so fatally defective that it cannot be presumed that the defendant could have a fair trial upon such information. For this reason, I concur in the reversal of the judgment.

ROSE, J., dissenting.

LETTON, J., not sitting.

IN RE ESTATE OF SARAH J. MERICA.
JOHNATHAN MERICA ET AL., APPELLANTS, V. JULIUS L.
GREER, ADMINISTRATOR, APPELLEE.

FILED DECEMBER 23, 1915. No. 18278.

WILLS: CONTEST: ATTORNEY'S FEES: ALLOWANCE: AMOUNT. Counsel were employed by decedent's husband, who was not a legatee, and the will was successfully contested. *Held*, that compensation for such services, the costs and necessary expenses thereof are proper charges against the estate. The amount of such allowances should be determined upon consideration of the reasonableness of the charges, the necessity of the employment, the actual services rendered, the size of the estate, and the benefits accruing thereto.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Reversed*.

Frederick Shepherd, for appellants.

John P. Breen, contra.

MARTIN, C.

Johnathan Merica and his wife, Sarah J., lived at Blair, Nebraska, where they had a small fruit farm. The husband was about 80 years of age and the wife 70. In 1909 they came to the city of Lincoln to live with a daughter, Mrs. Oelting. Thereafter the wife became insane, and upon a hearing before the insanity board was duly committed to the insane asylum. Soon thereafter the daughter, Mrs. Oelting, was appointed guardian for her mother. After a lapse of several months a sister, who resided in Seward county, took the incompetent out of the asylum on parole, and procured her release by proceedings in habeas corpus before the county court of that county. Immediately thereafter the incompetent made application to the county court of Lancaster county in the original guardianship proceedings to be discharged therefrom. This application was unsuccessful. A few months later, while she was at Oakland, Nebraska, she made a will, mak-

ing no mention of her husband, and allowing her daughter, Mrs. Oelting, one dollar, and giving some of her property to her sister and the rest to her other children. She died in Omaha not long after making this will. The will was offered for probate in the county court of Douglas County, and the husband, Johnathan Merica, employed counsel and contested the will, and the same was set aside for the want of testamentary capacity. No appeal was taken from this judgment. Johnathan Merica incurred costs, expenses and attorney's fees in securing the setting aside of the will. His claim and that of the attorneys employed by him for these costs, expenses and attorney's fees was disallowed by the county court, and on appeal to the district court a demurrer was sustained to the petition and the case was dismissed, and is now here on appeal.

This precise question has never been before this court. In *Mathis v. Pitman*, 32 Neb. 191, and in *Secbrock v. Fedawa*, 33 Neb. 413, the unsuccessful contestants of a will were allowed to recover their costs and attorney's fees upon the ground that they had instituted the contest in good faith and upon reasonable grounds. But these cases were overruled in *Wallace v. Sheldon*, 56 Neb. 55, wherein Commissioner Ragan wrote the opinion and said: "We do not attempt to formulate a rule for determining what state of facts will justify a court in any case in awarding costs to an unsuccessful litigant, but what we do decide is that the courts are not invested with the discretion to award costs or attorney's fees to an unsuccessful contestant of a will simply and solely because of the fact that he undertook the contest in good faith, and at the time he did there existed probable cause for the contest."

In the case of *Atkinson & Doty v. May's Estate*, 57 Neb. 137, which was an unsuccessful contest of a will, Commissioner Ragan, again writing the opinion, said: "The estate of a decedent is not liable to an attorney for services rendered by him for and at the request of a legatee under decedent's will in a contest thereof." No authorities are cited.

In *St. James Orphan Asylum v. McDonald*, 76 Neb. 630, this court held: "The estate of a decedent is not ordinarily liable to an attorney for services rendered by him, for and at the request of a legatee under decedent's will, in a contest thereof." This was a case wherein the attorneys for a legatee and proponent of a will were successful in sustaining it, and then sought to make their services a charge against the estate when their client received under the will three-fourths of the estate, amounting to \$150,000.

Thus it appears that the question of the allowance of attorney's fees as a claim against an estate has never come squarely before this court in a case where such attorneys were successful in setting aside a will.

This court has held that the county court has authority to allow attorneys reasonable fees as a claim against the estate when such attorneys were employed by the executor and rendered services which were necessary and beneficial to the estate. *Hazlett v. Estate of Moore*, 89 Neb. 372. It seems to be the general rule that compensation for attorney's services rendered under employments by executors, administrators, guardians, and trustees are proper claims against such estates. Matters of probate and settlement of estates are often complicated, requiring the executor or administrator to pass upon the intricacies of the law of which he is ordinarily ignorant. He must necessarily have counsel to guide him in the performance of his duties, and this to the end that the estate may be protected. This, no doubt, is the foundation for the rule which generally prevails.

In the syllabus of the *St. James Orphan Asylum* case, *supra*, there is an implication that counsel fees obligated by a legatee are chargeable to the estate. Evidently the writer of that opinion had in mind extraordinary cases wherein a legatee might employ counsel and still their services be justly compensated out of the estate. It is easy to suppose cases of such character. Take, for instance, a case where five children are only

nominal legatees and are allowed one dollar each under the will, and the remainder of the \$100,000 estate is bequeathed to some charitable purpose. One of the nominal legatees employs counsel, assumes the burden, and successfully contests the will. On what equitable theory should the estate escape the payment of reasonable counsel fees and expenses of the contest, and the nominal legatee who instituted and successfully carried it through be compelled to pay from his separate share the entire expenses when the estate and the other children profit four times as much as he does by the proceedings?

In the case at bar the will was successfully contested and set aside on the ground that the deceased lacked testamentary capacity. The property was saved to the lawful heirs. The services were eminently necessary and irrefutably beneficial to the estate. The fact that the executor of the false will employed counsel and resisted the assault upon the will and lost argues strongly that the estate was benefited. The property does not pass according to the terms of the false will, but it passes to the lawful heirs; an unlawful distribution is prevented and a lawful one enforced. Measured by this rule, even where the employment is actually made by an executor or administrator, instead of by the surviving husband who is not a legatee, as in this case, it is difficult to imagine a case wherein the necessity of the employment and the certainty of the benefits to the estate would be any more pronounced than they appear to be in the one before us. Because the services were rendered before the will was set aside and the administrator appointed does not destroy the force of the fact that the estate received the protection and benefits just as surely as it would have done had the administrator made the employment. Had the administrator employed these attorneys there would be no question under the authorities about the liability of the estate for the payment of their reasonable fees. By analogy there ought to be no question about the allowance of a reasonable amount to

the attorneys to be paid from the estate which they preserved for lawful administration.

When one who is not a legatee employs counsel through whose services the will is set aside, it is the duty of the court to consider a claim filed for such services, and allow, not necessarily the amount of the claim, but such amount as shall be just and reasonable, considering the necessity of the employment, the actual services rendered, the size of the estate, and the benefits accruing thereto by reason of the services. When no necessity exists for the services and no benefits accrue to the estate, no compensation should be allowed. This we regard as a sound, safe and equitable rule. Included in this claim were some items for expenses and services in making and presenting objections to the jurisdiction of the county court of Douglas county. Such items should not be allowed against the estate. But there were items separately itemized for costs in the taking of depositions and procuring evidence for the contest, amounting to \$58, which are clearly statutory costs and should have been allowed by the court. These, together with perhaps other items of cost and reasonable attorney's fees, should be allowed in accordance with the views herein expressed. The judgment is reversed and the cause remanded.

BY THE COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for a new trial, and this opinion is adopted by and made the opinion of the court.

REVERSED.

CASES DETERMINED
IN THE
SUPREME COURT OF NEBRASKA
JANUARY TERM, 1916.

MEYER PANSIK, ADMINISTRATOR, APPELLEE, v. MISSOURI
PACIFIC RAILWAY COMPANY ET AL., APPELLANTS.

FILED JANUARY 15, 1916. No. 18500.

Railroads: ACTION FOR DEATH: CONTRIBUTORY NEGLIGENCE. An adult person, in attempting to pass over the coupling between two cars standing on a street crossing and liable to be moved by an engine attached to them for switching purposes, is guilty of contributory negligence, which will preclude a recovery for his injury and death in consequence of the moving of the cars.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Reversed.*

B. P. Waggener, J. A. C. Kennedy and Philip E. Horan,
for appellants.

Weaver & Giller, contra.

BARNES, J.

This was an action by the administrator of the estate of Paul Pansik to recover damages for the negligent killing of his decedent.

Plaintiff alleged in his petition that the defendants were negligent in causing their train of cars to be backed across Nicholas street and allowing it to stand there in a solid train, consisting of some 26 cars, for several minutes, thus forbidding the free use of the street; that they

99 Neb.] (234)

were negligent in uncoupling the train at a point north of Nicholas street; that they were negligent in causing a part of said train to start up suddenly and with a jerk towards the south, thereby throwing plaintiff's intestate from the position that he had taken on said cars down upon the rail of defendant's track, causing his death; that they were negligent in failing to give deceased any warning of their intention to start the train; that they failed to keep a proper lookout to ascertain the presence of people crossing between the cars of said train, which was standing upon and over Nicholas street; that they failed to ascertain that the plaintiff's intestate was crossing between the cars at the time the train was started forward. The defendants filed separate answers which contained a general denial and an allegation that the accident which caused the death of Paul Pansik was due entirely to his own negligence. The reply was a general denial. At the close of the plaintiff's evidence the defendants requested the court to direct the jury to return a verdict in their favor. The request was refused. The defendants introduced no evidence. The court gave his instructions to the jury, consisting of some 15 paragraphs, each of which was excepted to by the defendants. The jury returned a verdict for the plaintiff and against both defendants for \$7,500, on which the court rendered judgment, and the defendants have appealed.

The facts, as shown by the evidence, are, in substance, as follows: On the morning of the 23d day of August, 1912, shortly before 7 o'clock, Paul Pansik, then about 19 years of age, came down Nicholas street on his way to his work in the Union Pacific shops. He was going east on the south side of said street. When he arrived at Fifteenth street, he found the way blocked by the defendant's train, which was switching at that point. The train had just been backed or pushed in by an engine to which it was attached about four car lengths south of the crossing. A coal car was on the crossing, and the train extended farther north, a distance of about 20 car lengths. The

train stood there about three minutes, when the flagman, who was on the east side, uncoupled the cars at the north line of the street and signalled to the engineer to pull back to the south in order to open up the street crossing. The testimony shows that two persons climbed over the bumpers between the cars at the north side of the street where the flagman was uncoupling, but two witnesses who stood east of the crossing on the south side of the street stated that no one had attempted to pass between the cars at that side of the street. Just as the flagman uncoupled the cars at the north side of Nicholas street, Paul Pansik climbed upon the bumpers between the cars at the south line of the street, and, when the cars were moved to the south, fell or was jerked off from the bumpers, fell upon the track, and two truck wheels passed over his body, instantly killing him.

The record discloses that Nicholas street crosses the railroad yards, and on what was the extension of Fifteenth street there is a large number of tracks which are used in switching cars and making up trains. Plaintiff's evidence shows that at the time the accident occurred the train in question had not blocked the crossing for a period of more than three to five minutes; that quite a number of persons came down Nicholas street from the west on their way to work. Plaintiff's witnesses, Miss Bigley and Miss Baber, were on their way west on the south side of the street, and arrived at the crossing just at the time the train backed in from the south. They both testified, in substance, that defendant Ryder and the flagman were on the east side of the train at the point where the flagman uncoupled the cars; that two men came through between the cars at that point just as they were uncoupled. The witnesses were standing on the east side of the train at the south side of the street. They both testified that no one had attempted to cross over between the cars on the south side but Paul Pansik; that he climbed up on the bumpers between the cars directly in front of them, and that as the train was moved to the south he slipped or fell to the

track and was run over and killed; that none of the trainmen were where they could see Pansik, and there is no evidence showing, or tending to show, that any of the defendant's servants knew that Pansik was attempting to cross over between the cars. The engine attached to the south end of the train was in plain sight. Sam Temin, a witness for plaintiff, testified, in substance, that there were no trainmen on the west side of the train; that he came down the street from the west and on the south side; that there was quite a number of persons there when Paul Pansik started to go over the cars from the west to the east side; that he himself was just behind Pansik; that the train gave a pull, and Pansik fell down on the track and was killed. He testified that he did not see the engine then, but saw it afterwards, and that he saw no signal and heard no bell or whistle. Miss Bigley and Miss Baber also testified that they heard no bell or whistle. Barney Feltman's testimony was, in effect, the same as Temin's. There was no evidence showing, or tending to show, any act of negligence on the part of defendant Ryder. He was on the east side of the train north of the flagman and at a point where he could see the engine and attend to his duties in managing the switching crew.

Appellants contend that the court erred in refusing to direct the jury to return a verdict in their favor. If this contention is sustained, the judgment must be reversed, and it will not be necessary to consider any of the other assignments of error.

As shown by the evidence, the accident in question happened at a public street crossing in the city of Omaha, and the plaintiff's rights at that point were greater than they were at other places on defendant's right of way. At public crossings the rights of the railroad company and the public are equal, and each has the right to assume that the other would be controlled by such considerations as would influence a man of ordinary care and prudence. Plaintiff's decedent had the right to the reasonable use of the crossing at Nicholas street for his own purposes,

subject to the right of the defendant railroad company to make a reasonable use of the crossing in conducting its business through the city. *Williams v. Chicago, B. & Q. R. Co.*, 78 Neb. 695. The delay caused plaintiff's decedent was slight, and did not justify him in attempting to cross over between the cars, to which a live engine was attached, without ascertaining, or attempting to ascertain, whether the cars were about to be moved or not. It was gross negligence for young Pansik to make such an attempt. By his own conduct he placed himself in a dangerous position without any knowledge of his presence or his danger on the part of those in charge of the train. They had not, by any conduct on their part, invited Pansik to make the attempt to cross over between the cars. As a matter of fact, they were engaged in opening the crossing. If Pansik had waited only three minutes the way would have been clear, and the accident could not have happened. As we view the record, plaintiff's decedent was guilty of such contributory negligence as would prevent a recovery for his injury and death. 3 Elliott, Railroads (2d ed.) sec. 1169; 2 White, Personal Injuries, sec. 1028; *Howard v. Kansas City, F. S. & G. R. Co.*, 41 Kan. 403. It was not the duty of the flagman or switchmen to examine the train at the crossing to determine that pedestrians had not placed themselves in a position of danger. *Hudson v. Wabash W. R. Co.*, 101 Mo. 13; *Atchison, T. & S. F. R. Co. v. Cross*, 58 Kan. 424.

In *Bird v. Flint & P. M. R. Co.*, 86 Mich. 79, the court said: "A train standing upon a highway, with an engine attached, is of itself notice of danger; and, in the absence of a special assurance on the part of the defendant to one desiring to cross that he may safely do so, so far as any movement of the train is concerned, he assumes all the risks. To attempt to cross, in the absence of such assurance, is gross negligence."

In *Jones v. Illinois C. R. Co.*, 104 S. W. (Ky.) 258, it was said: "It may be conceded that appellant, as well as

the general public, had a right to use this crossing, and that the company might be guilty of a nuisance in obstructing it for an unreasonable length of time; but under the facts of this record these rights and obligations did not relieve the appellant of the duty of exercising ordinary care for his own safety or fix responsibility on the company for injuries received by his gross contributory neglect. When a train of cars is standing temporarily, as these were, on a crossing, and there is a live engine nearby or attached to the train, liable to move them at any moment, persons who desire to cross the track do so at their own peril if they make the attempt by going under, climbing over, or passing between the cars; and the company will not be liable for injuries received by them unless their dangerous condition is discovered in time to prevent accident. The presence of cars and an engine, either attached to them or in the immediate vicinity for the purpose of moving them, is such an obvious warning of danger to adult persons attempting to cross under, over, or between them that to do so is gross negligence, and there can be no recovery for injuries received under circumstances like these."

We are of opinion that the great weight of authority is such that the trial court should have directed a verdict for the defendants. The judgment is therefore reversed and the cause is remanded to the district court for further proceedings.

REVERSED.

ROSE, J., not sitting.

**ALZINA CRITCHFIELD, ADMINISTRATRIX, APPELLEE, v. OMAHA
& COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.**

FILED JANUARY 15, 1916. No. 18504.

Street Railways: ACTION FOR DEATH: CONTRIBUTORY NEGLIGENCE. Plaintiff's decedent, a young business man who lived in the city of Omaha and was familiar with the operation of street cars, stepped from a north-bound moving car opposite the termination of Templeton street. He immediately went around the back end of the car from which he had alighted and started to cross a parallel track without looking or listening for an approaching car. He came in contact with, and was killed by, a south-bound car which is alleged to have been running at an excessive rate of speed on the parallel track. *Held*, that he was guilty of contributory negligence precluding a recovery.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Reversed*.

John L. Webster and W. J. Connell, for appellant.

Matthew Gering and Sutton, McKenzie, Cox & Harris,
contra.

BARNES, J.

This was an action by the administratrix of the estate of Harlon Critchfield against the Omaha & Council Bluffs Street Railway Company to recover damages alleged to have been sustained by the widow and next of kin by the killing of plaintiff's decedent. A trial in the district court for Douglas county resulted in a verdict for the plaintiff for \$6,000, upon which the court rendered a judgment, and the defendant has appealed.

The record before us discloses that on the night of October 3, 1912, Critchfield, who was familiar with the movements of street cars, became a passenger on one of defendant's cars north-bound at Twenty-fourth street and Ames avenue in the city of Omaha, intending to alight at

the intersection at the north side of Templeton street, which street does not cross Twenty-fourth, but terminates at the east side of that street. As the car approached the north line of Templeton street, while it was still running at a speed of from two to six miles an hour, and before it reached the regular stopping place, Critchfield got off from the moving car and immediately went west around the south end of the car without looking or listening for the approach of the south-bound car, with which he came in contact, on a parallel track. The projection at the end of the front vestibule struck his head. The impact threw him back to the southeast and just across the north-bound track. He was taken to a hospital, where he died without having fully recovered consciousness.

The witnesses who saw the accident do not materially differ in their testimony in any important particular.

It was admitted by defendant that Critchfield received a wound on the frontal bone of the head over the right eye, which resulted in a complex fracture; the skull was crushed, such as could only result from a terrific impact. The fracture extended towards the right jaw and caused a counter fracture at the base of the brain. He had an injury on the back of his right hand and was unconscious most of the time until his death in November. There was a contused wound, not an abrasion, upon the inside of the left leg about eight inches above the heel.

It clearly appears that this is not a case where the car on which Critchfield was a passenger had come to a stop at the usual place for discharging passengers. Neither is it a case where one car was passing another car which had come to a stop and was in the act of discharging its passengers. It is a case where a passenger got off a moving car while it was opposite the termination of a city street, and at a time when the car from which he alighted was running at a speed of from three to six miles an hour.

The record shows that Critchfield's actions were such as to establish a clear case of contributory negligence on his part, which was the proximate cause of his death.

In *Doty v. Detroit Citizens' Street R. Co.*, 129 Mich. 464, it was said: "It is apparent that by a moment's delay, allowing the car which he had just left time to move forward, the plaintiff would have a view of the track which would enable him to see any approaching car. It is also evident, if he had exercised ordinary care before attempting to step upon the track upon which the car was approaching which injured him, he would have seen the car. Upon the facts as disclosed by his own testimony, he was guilty of contributory negligence, and the court properly directed a verdict in favor of defendant."

In *Deane v. St. Louis Transit Co.*, 192 Mo. 575, it was said: "The unfortunate accident in this case would easily have been avoided if the deceased had taken the slightest care to prevent it. Instead of doing so, he walked onto the track, or so close to it as to be injured, without looking for an approaching car, but with his eyes fixed in an opposite direction, and, as some of the witnesses say, reading his paper while he walked. The conclusion is irresistible that the deceased was guilty of contributory negligence which cuts off a recovery, even though the defendant could properly, under the evidence in the case, be said to have been guilty of negligence, for there is no evidence whatever of any recklessness or wantonness in the case. It follows that the judgment of the circuit court must be reversed."

In *Shuler v. North Jersey Street R. Co.*, 75 N. J. Law, 824, it was stated that the plaintiff alighted from a car, passed around the rear platform, and was struck by the corner of the fender of a car approaching at an excessive speed on the other track, just as he reached the nearest rail of that track. He looked for the approaching car just as he was struck. The trial court allowed plaintiff to recover, but the appellate court reversed this judgment, saying: "The excessive speed of the car is persuasive of

negligence on the part of the defendant, but we fail to see how it relieves the plaintiff of the charge of contributory negligence for not looking, or for not waiting until the obstruction to his vision by the car from which he had alighted was removed. The speed of the car in no way prevented him from seeing its approach, and the faster it was going the less excuse he had for advancing in a direction across its track. If it were going so fast that the motorman obviously did not intend to respect his right, he would have been guilty of negligence in attempting to cross."

Plaintiff strenuously contends that the defendant was negligent in not sounding the gong on the car with which Critchfield came in contact. As to that question, several witnesses testified that the gong was sounded, while others stated that they did not hear it sounded. This evidence should not prevail over the positive statements of disinterested witnesses who testified that they heard the gong sounded.

The cases cited by plaintiff in support of the right of recovery are distinguishable from the facts in the case at bar.

In conclusion, we are satisfied that the record discloses such contributory negligence on the part of Critchfield that there should be no recovery in this case. The trial court, therefore, erred in overruling defendant's motion for a directed verdict. The judgment of the district court is reversed and the cause is remanded.

REVERSED.

MORRISSEY, C. J., dissenting.

LETTON, J., not sitting.

NYE-SCHNEIDER-FOWLER GRAIN COMPANY, APPELLANT, v.
MICHAEL HOPKINS ET AL., APPELLEES.

FILED JANUARY 15, 1916. No. 18126.

1. **Deeds: FORFEITURE OF TITLE.** Where a contract, under which the title to an elevator site was conveyed to a grain dealer for the erection of an elevator, contains the provision that, "in case the elevator burns or is otherwise destroyed," grantee "will rebuild the same within a reasonable time, or, failing to thus rebuild, reconvey the real estate" to the grantor, the title of the grantee cannot be forfeited for not rebuilding, until the lapse of a reasonable time after the destruction of the elevator.
2. ———: ———. Where land is conveyed by a deed containing the provision that, in case of the destruction of a building thereon and the failure of the grantee to rebuild within a reasonable time, the grantee shall reconvey the land to the grantor, grantee does not lose title by forfeiture during an extension of time duly granted for rebuilding purposes.
3. ———: **AGREEMENT TO RECONVEY: WAIVER.** The right of a corporate grantor to demand a reconveyance of land in the event of a breach of an agreement by grantee to rebuild an elevator thereon within a reasonable time after its destruction by fire may be waived without the formalities essential to the execution of a deed conveying real estate.
4. **Principal and Agent: CONTRACT BY AGENT: ACCEPTANCE OF BENEFITS.** "A principal who accepts the benefits of a contract executed in his behalf by an agent is chargeable with the instrumentalities employed by the latter in procuring it." *Tylee v. Illinois C. R. Co.*, 97 Neb. 646.
5. ———: ———: ———. "A principal will not be permitted to adopt the beneficial part of an unauthorized contract made by his agent and reject the remainder." *Farmers & Merchants Bank v. Farmers & Merchants Nat. Bank*, 49 Neb. 379.

OPINION on motion for rehearing of case reported in 98 Neb. 512. *Former judgment of affirmance vacated, and judgment of district court reversed, with directions.*

ROSE, J.

This is an action to quiet title to an elevator site in Omaha. The real parties to the controversy are Nye-Schneider-Fowler Grain Company, plaintiff, and the Chicago Great Western Railroad Company, defendant. The action involves the title to land conveyed to plaintiff by the Omaha Grain Terminals company, a subsidiary of defendant, pursuant to a contract executed March 1, 1906. According to that contract, plaintiff agreed to construct upon the site in dispute an elevator with a capacity of 750,000 bushels. Defendant promised to construct switch tracks and to furnish to the elevator as long as it "shall be operated by the Nye-Schneider-Fowler Company or by any company controlled by said Nye-Schneider-Fowler Company" a "free in-switch." It was further provided: "The Nye-Schneider-Fowler Company hereby agrees that, in case the elevator burns or is otherwise destroyed, it will rebuild the same within a reasonable time, or, failing to thus rebuild, reconvey the real estate to the Terminals company." The elevator was constructed and operated by plaintiff until destroyed by fire. Upon its completion the site was deeded to plaintiff. The elevator has not been rebuilt. Defendant claims the land by reason of the forfeiture clause quoted, and asks for a decree quieting the title in its name. Plaintiff insists that the period for rebuilding the elevator was extended by defendant until the contract of March 1, 1906, was canceled by a subsequent agreement. The trial court quieted the disputed title in defendant. Plaintiff appealed and the judgment was affirmed. *Nye-Schneider-Fowler Grain Co. v. Hopkins*, 98 Neb. 512. A rehearing was granted upon motion of plaintiff and the cause has been reargued.

During the former argument on the appeal, it was conceded that the controversy should be treated as if the parties to the transactions were the plaintiff and the defendant as already described herein. *Nye-Schneider-Fowler Grain Co. v. Hopkins*, 98 Neb. 512.

Plaintiff argues that defendant waived and released the right to insist upon a reconveyance of the land. The fire occurred April 3, 1910. The grain in the elevator continued to burn for several months thereafter, and the work of rebuilding was practically impossible during that time. Plaintiff's president and manager testified that it would have taken at least a year to rebuild the elevator under favorable conditions. He had written defendant's officers in 1910, "We would very probably not rebuild our Omaha elevator;" but he also testified that no decision in the matter had been reached, and that the question was being kept open until certain matters concerning the grain market at Omaha were settled. John W. Blabon, vice-president of defendant in charge of traffic, wrote plaintiff August 15, 1910:

"In conversation with Mr. Berry prior to his visiting Omaha I said to Mr. Berry that we desired to impress you with our disposition to grant you reasonable time in which to rebuild on our terminals, which meant that if conditions were not favorable to your rebuilding at once the question could go over until another year."

In the same letter Blabon expressed a desire for an arrangement which would avoid the burden of the "free in-switch." This privilege of plaintiff was an expensive and troublesome obligation of defendant. The principal purpose of the latter in carrying on the negotiations was relief from this condition of affairs. Plaintiff had not decided to rebuild, but desired to lease from defendant an independent elevator. The privilege of a free in-switch applied alone to the elevator operated by plaintiff on the site in controversy. Blabon, the vice-president of defendant in charge of traffic, sent the following telegram to plaintiff July 24, 1911:

"If we could both agree on canceling the contract of March, 1906, both interests relinquishing all rights thereunder, we might entertain leasing you independent house for one year at rate of ten thousand, you to undertake to give us at least two thousand cars for Chicago and

Minneapolis. * * * This would mean disregard of any land proposition as partial or whole payment and leave you free to negotiate this with others."

Plaintiff answered, offering to pay a rental of \$6,000, and refusing to guarantee tonnage. Blabon, July 25, 1911, replied:

"We feel that the rental you propose is inadequate and that other inducements to turning the house over to you exclusively are too indefinite. * * * Mr. Somers plans to be in Omaha tomorrow and you can discuss matter with him, and, if necessary, I will spend Thursday there as I propose to dispose of the matter one way or the other this week."

Somers was the general freight agent of defendant. July 27, 1911, he met with officers of plaintiff, and a memorandum was drawn up and approved, leasing the independent elevator to plaintiff as the second party for one year from July 15, 1911, for a rental of \$8,000. It provided for the payment of switching charges on cars both in and out of the terminal, and contained the following stipulations:

"A certain contract between first party and allied interests on one hand and second party on other, dated March, 1906, to be canceled by both, both interests relinquishing all rights thereunder. The second party's land to be freed to it, and if necessary quitclaim deed to pass to confirm title in second party."

Somers wrote to plaintiff August 8, 1911, stating that in agreeing to the provision just quoted he had exceeded his authority and that the agreement of March 1, 1906, could be canceled only by resolution of the board of directors of the Terminals company. He also said: "All of the other provisions in our memorandum of agreement will be carried out substantially as outlined. * * * We will at once publish a tariff assessing an in-switching charge, and as to what effect this will have on the agreement is mere conjecture." A tariff with an in-switching charge was in fact published by defendant, contrary to the terms

of the contract of March 1, 1906. October 6, 1911, a formal lease for the independent elevator for one year at a rental of \$8,000 was executed as of date July 15, 1911, conforming to the memorandum of July 27, 1911. In returning the executed lease, plaintiff inquired, referring to the memorandum of July 27, 1911, regarding the cancelation of the contract of March 1, 1906: "When will the quit-claim deed be ready?" Plaintiff's president testified that there were no negotiations subsequent to the memorandum of July 27, 1911. The lease was executed without substantial variance from the memorandum of that date.

To prevent the quieting of title in plaintiff, defendant urges the following propositions: Somers had no authority to agree to cancel the contract of March 1, 1906. The memorandum was not a contract. Defendant had title to the land. It could not be conveyed except under the direction of the board of directors of the Omaha Grain Terminals company. The position thus taken does not seem to be tenable. When the deed was delivered to plaintiff upon completion of the elevator, the title vested in plaintiff, subject to reconveyance on the terms specified in the contract of March 1, 1906. The title remained in plaintiff, subject to forfeiture, if it failed to rebuild the elevator within a reasonable time after its destruction. What was a reasonable time depended upon the circumstances. The conduct of the parties is evidence of what they considered to be a reasonable time. By its acts or agreements defendant could extend the period for rebuilding the elevator. The letter of its vice-president, August 15, 1910, amounted to an extension for one year, even if the circumstances indicated a shorter term; but it is not shown that a reasonable time for rebuilding had expired. On the contrary, the record shows that defendant considered that the title remained in plaintiff. Correspondence leading to the memorandum of July 27, 1911, indicates this. Had plaintiff forfeited its rights under the contract of March 1, 1906, defendant would be under no obligation to furnish plaintiff a free in-switch. The evidence shows,

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as already intimated, that the purpose of defendant in conducting the negotiations terminating in the memorandum of July 27, 1911, was to be relieved from the liability to furnish free switching facilities. There was no forfeiture of plaintiff's title to the elevator site. The title was in plaintiff, and not in defendant. The latter's interest was a mere right to a reconveyance in case plaintiff did not rebuild the elevator within a reasonable time. The waiver thereof did not require a conveyance of real property or the formalities incident to such a transaction. An authorized agent may agree to cancel or waive such a right. *St. Clair v. Rutledge*, 115 Wis. 583.

Plaintiff insists that Somers had authority to cancel or waive any existing right to a reconveyance; but, even if this position is untenable, defendant ratified his acts by accepting benefits secured thereby. Somers was the general freight agent of defendant. Blabon was vice-president in charge of traffic. In-switching is a branch of that subject. Somers was acting under the direction of Blabon, and the agreement made by the former contained the general terms which Blabon had suggested to plaintiff. The main purpose of Blabon was to relieve his principal from a costly obligation to furnish switching services without charge. This purpose was accomplished through the memorandum made by Somers. Pursuant to its terms defendant published a tariff requiring plaintiff to pay the regular charges for in-switching. Plaintiff executed the lease for the independent elevator in accordance with the terms of that memorandum and delivered it to defendant with the understanding that plaintiff should have a quitclaim deed to the property in controversy. If Somers was without actual authority to represent defendant in canceling the contract of March 1, 1906, his principal, by knowingly adopting his acts and by retaining the benefits thereof, is bound by his agreements. The rules are:

"A principal who accepts the benefits of a contract executed in his behalf by an agent is chargeable with the in-

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strumentalities employed by the latter in procuring it." *Tylee v. Illinois C. R. Co.*, 97 Neb. 646.

"A principal will not be permitted to adopt the beneficial part of an unauthorized contract made by his agent and reject the remainder." *Farmers & Merchants Bank v. Farmers & Merchants Nat. Bank*, 49 Neb. 379.

For the reasons stated, the judgment of affirmance is vacated, and the judgment of the trial court is reversed, with directions to enter a decree quieting in plaintiff the title to the land in controversy.

REVERSED.

MORRISSEY, C. J., dissents for the reasons stated in the former opinion.

HAMER, J., dissents.

LAVILLA J. BURTLESS, APPELLEE, v. MCCOOK IRRIGATION & WATER POWER COMPANY, APPELLANT.

FILED JANUARY 15, 1916. No. 18493.

Waters: IRRIGATION: DISCRIMINATION. The evidence examined and referred to in the opinion held insufficient to sustain any recovery by plaintiff.

APPEAL from the district court for Red Willow county:
ERNEST B. PERRY, JUDGE. *Reversed and dismissed.*

C. E. Eldred, for appellant.

W. S. Morlan, contra.

FAWCETT, J.

The defendant, a corporation organized under the laws of this state, has for more than 20 years been engaged in the business which its name implies, and plaintiff is the owner of land lying under its irrigation canal and within

the territory which can be successfully irrigated by water therefrom. On January 30, 1912, plaintiff instituted this suit in the district court for Red Willow county. Her petition recites that the usual charge made by defendant for perpetual water rights has been at the rate of \$6.25 an acre; that she applied to defendant for a perpetual water right and offered to pay defendant the full rate and charge exacted and demanded of owners and holders of perpetual water rights, for use of water; that defendant wrongfully refused to accept plaintiff's application equally and without discrimination as compared with other users of water of said canal, but unjustly and unreasonably demanded of plaintiff the sum of \$35 an acre for such perpetual water right; that the sum demanded is unlawful, unreasonable and discriminatory. Her prayer is that she be decreed to be entitled to a perpetual water right for 42 acres of land upon bringing into court and paying defendant therefor the sum of \$208, and that defendant be enjoined from discriminating against her by charging and demanding more from her than from other consumers under its canal, and from making and demanding other than uniform rates governing the delivery of water from its canal for irrigation purposes, and for general relief. The district court found for plaintiff as to her right to maintain the suit, and decreed that she have a perpetual water right for the land described in her petition upon bringing into court and paying to defendant for such water right \$500, and enjoined defendant as prayed in the petition. Defendant appeals.

The petition and answer both proceed upon the theory that the regulation of perpetual water rights is a matter within the jurisdiction of the state railway commission. The petition alleges that defendant has never had rates fixed or determined by the state railway commission or by any tribunal, board or public officer whatever. The answer alleges that on September 11, 1911, defendant filed with the state railway commission its schedule of rates and charges as fixed by it for water furnished, sold and deliv-

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ered under both permanent water rights and for rental service; that such schedule was approved by the railway commission and ever since has been in full force and effect. In determining this appeal, we deem it unnecessary to consider the question of the jurisdiction of the state railway commission to determine the price which a corporation, such as defendant, may charge for the sale of its perpetual water rights. Regardless of that question, plaintiff has not sustained her allegations of unjust or discriminatory action by the defendant. The record shows that prior to April 7, 1911, defendant had no established or settled rate for the sale of perpetual water rights, but sold such rights from time to time in a manner which indicates that such sales were made to meet then existing conditions. From the time of its organization down to the date just named it made sales of perpetual water rights at rates ranging from \$6.25 to \$20 an acre. On that date, at a meeting of the water committee of defendant at the secretary's office, it was unanimously voted to sell no more perpetual water rights at a price less than \$35 an acre and to furnish no water under lease at a less price than \$3.50 an acre. The record shows that since the taking of such action these rates have been strictly adhered to, and all sales of perpetual water rights have been made at \$35 an acre.

The judgment of the district court is reversed and the suit dismissed.

REVERSED AND DISMISSED.

SEDGWICK, J., not sitting.

ISAIAH H. WASSON, APPELLEE, v. MCCOOK IRRIGATION &
WATER POWER COMPANY, APPELLANT.

FILED JANUARY 15, 1916. No. 18494.

The syllabus in *Burtless v. McCook Irrigation & Water Power Co.*, ante, p. 250, applied to this case.

Bodie v. Bates.

APPEAL from the district court for Red Willow county:
ERNEST B. PERRY, JUDGE. *Reversed and dismissed.*

C. E. Eldred, for appellant.

W. S. Morlan, *contra*.

FAWCETT, J.

This suit is an exact counterpart of *Burtless v. McCook Irrigation & Water Power Co.*, *ante*, p. 250, except that it seeks to recover a perpetual water right for 160 acres of land upon the payment of \$1,000. The cases were tried upon substantially the same pleadings and evidence and are governed by the same rules of procedure. It follows that our judgment in that case must control this.

The judgment of the district court is therefore reversed and the suit dismissed.

REVERSED AND DISMISSED.

SEDGWICK, J., not sitting.

LUCIE BODIE, APPELLEE, v. EDWARD BATES, APPELLANT.

FILED JANUARY 15, 1916. No. 19146.

1. **DIVORCE: JURISDICTION.** In the state of Arkansas, divorce and all incidental questions, including alimony and matrimonial causes, are not subjects of equitable jurisdiction. In such cases the courts of that state have no other powers than those expressly conferred by the statute. *Bowman v. Worthington*, 24 Ark. 522.
2. —: **PROPERTY RIGHTS: STATUTES: CONSTRUCTION.** Sections 2681, 2684, Kirby's Digest of the Statutes of Arkansas, set out in the opinion, examined, and *held*, that section 2681 applies to cases where a husband obtains a decree of divorce against his wife, and section 2684 to cases where the decree is granted to the wife against her husband.
3. —: —: —. Section 2684, Kirby's Digest of the Statutes of Arkansas, examined, and *held* to expressly determine just what interest a wife shall take in both real and personal property

of her husband where she is granted a divorce, and that under that statute the Arkansas court could not have vested in plaintiff in this suit, who was defendant there, an interest for life, or other interest, in the land of which her husband was then seised located in Nebraska.

4. ———: ALIMONY. The pleadings and decree of the court of chancery in Arkansas examined, and *held* to have allowed plaintiff, as alimony, the sum of \$2,611, and no more; and that such sum was the amount which she was entitled to receive out of the estate of defendant, located in the state of Arkansas.
5. Judgment: RES JUDICATA. "It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit." *Russell v. Place*, 94 U. S. 606.
6. ———: ESTOPPEL. "The general principles governing the pleading and proof of former judgments as estoppels are now quite well settled by so long a line of authorities that it is useless to review them. Generally speaking, in order that a judgment in one action shall operate as an estoppel in a second action, it must be made to appear, not only that there was a substantial identity of issues, but that the issue as to which the estoppel is pleaded was in the former action actually determined." *Slater v. Skirving*, 51 Neb. 108.
7. Divorce: ALIMONY. The evidence in the record, taken in connection with the pleadings and decree in the chancery court of Arkansas, and the then value of the real estate owned by defendant in the state of Nebraska, *held* to conclusively show that the court of chancery in Arkansas did not take the Nebraska land into account in fixing the amount of alimony allowed plaintiff.
8. Estoppel: INCONSISTENT CONTENTIONS. A party cannot in one litigation insist that the court has no jurisdiction of specified property and succeed in that contention, and afterwards in another litigation with the same party insist that the court did have jurisdiction of that particular property and should have adjudicated it in the former action contrary to his contention there made, and so defeat an adjudication thereof entirely.
9. Divorce: ALIMONY: JURISDICTION. The Arkansas court being without jurisdiction to take the Nebraska land into account in fixing the amount of alimony allowed plaintiff, and having for that rea-

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son refused so to do, its judgment was right, and an appeal therefrom would have been unavailing.

10. ———: ———: **FOREIGN JUDGMENT: FULL FAITH AND CREDIT.** The contention that the decree in this case does not give full faith and credit to the judgment of a sister state is without merit.
11. **Former Opinion: LAW OF THE CASE.** The opinion on the former hearing in this case, 95 Neb. 757, in so far as it is applicable to the facts now appearing in the record, is adhered to as the law of the case.

APPEAL from the district court for York county: EDWARD E. GOOD, JUDGE. *Affirmed.*

Field, Ricketts & Ricketts, W. L. Kirkpatrick and J. Wythe Walker, for appellant.

S. P. Davidson and Gilbert Brothers, contra.

FAWCETT, J.

On the first trial of this cause in the district court for York county, a general demurrer to the petition was sustained and plaintiff appealed to this court. We found that the petition stated a cause of action, and the judgment was reversed and the cause remanded for trial. 95 Neb. 757. The trial in the district court after the case was remanded resulted in a decree in favor of plaintiff for \$10,000 alimony. Defendant appeals.

Our former opinion contains quite a full recital of the troubles of plaintiff and defendant, while husband and wife, and a sufficient statement of the issues involved in this suit. The parties were divorced March 2, 1911, in the court of chancery in Benton county, Arkansas, and plaintiff, by the decree in that case, was restored to her maiden name of Bodie, which accounts for the difference in the names of the parties in the present suit. As reference will frequently be made in this opinion to the parties as they appear in the Arkansas suit and as they appear in the present suit, we will, for the purpose of avoiding any confusion as to the parties, refer to the plaintiff in this suit, who was the defendant in the Arkansas court, as "Bodie" and to her former husband, defendant in this suit, as

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"Bates." In the Arkansas court Bates instituted the suit for divorce, alleging infidelity and other misconduct. Bodie denied the allegations of the petition and prayed for a decree of divorce in her favor. She alleged the property of Bates in Arkansas, and also alleged that he was the owner of real estate in Nebraska of the value of \$48,000, and prayed judgment and alimony. Bates and his counsel there contended on the trial of that suit that, under the law of Arkansas, the court in fixing the amount of alimony could not take into consideration the Nebraska land and allow the wife alimony on account of the value of such land. This contention was sound. The rule is settled in Arkansas that "in divorce cases the court of equity must look to and be governed by the statute, and cannot exercise inherent chancery powers not provided by the statute." *Ex parte Helmert*, 103 Ark. 571. "Where by statute jurisdiction over particular subjects of equity is conferred, or given to common law courts, the entire body of law administered in the equity courts of this country attaches; but the subject of divorce and all incidental questions, including alimony and matrimonial causes, are not subjects of equitable jurisdiction; and in such cases the courts have no other powers than those expressly conferred by the statute." *Bowman v. Worthington*, 24 Ark. 522. See, also, *Thomas v. Thomas*, 27 Okla. 784.

In our former opinion we determined (p. 762): "An examination of the Arkansas statute above set out shows that in that state no provision is made authorizing a money judgment as alimony. The law expressly declares just what interest the wife shall take in both the real and personal property of her husband, where she is granted a divorce. As to real estate, the provision is that she shall be entitled to 'one-third of all lands of which her husband is seised of an estate of inheritance at any time during the marriage for her life, unless the same shall have been released by her in legal form.' It will not, of course, be contended by any one that under that statute the Arkansas court could have vested in Mrs. Bates, for life, one-third

of the lands of which her husband was then seised located in Nebraska. That provision unquestionably refers to lands situated within the jurisdiction of the court." We also decided (p. 763): "It is clear, therefore, that as to the Nebraska land, the rights of the parties were not adjudicated in that action." There is some contention now that our former decision as to the effect of the Arkansas statute, and as to the fact that the Arkansas court did not allow alimony on account of the York county land, should not be considered as the law of the case because of the evidence which was introduced upon the trial from which this appeal is taken. The Arkansas statute referred to in the opinion, so far as it is pleaded and proved in the case, reads as follows: "And where the divorce is granted to the wife, the court shall make an order that each party be restored to all property not disposed of at the commencement of the action which either party obtained from or through the other during the marriage and in consideration or by reason thereof; and the wife so granted a divorce against the husband shall be entitled to one-third of the husband's personal property absolutely, and one-third of all the lands whereof her husband was seised of an estate of inheritance at any time during the marriage for her life, unless the same shall have been relinquished by her in legal form." Kirby's Digest, sec. 2684. The record now shows that there is a prior section of the statute of Arkansas which provides: "When a decree shall be entered, the court shall make such order touching the alimony of the wife and care of the children, if there be any, as from the circumstances of the parties and the nature of the case shall be reasonable." Kirby's Digest, sec. 2681. Can these two sections of the statute be construed together, or must they be distinguished and construed to apply to different conditions or situations? That they cannot be construed together is apparent upon their face, for they are directly contradictory. The statute first above quoted, which prescribes specifically what shall be allowed the wife as alimony when

she is "so granted a divorce against the husband," is a later statute than section 2681, above quoted. Section 83, p. 936, 1 R. C. L., shows very clearly why section 2681 was enacted by the Arkansas legislature, viz.: "According to the rule of the common law, where a divorce was granted for the misconduct of the wife, she was not entitled to alimony. This was productive of so much hardship, however, and so frequently left her a prey to starvation or a life of shame, especially where her own property had become vested in her husband by reason of the marriage, that statutes have been enacted in England and a number of the United States authorizing the courts to make such an allowance of alimony in favor of a guilty wife as the surrounding circumstances may justify." Two of the states cited in this text are Arkansas and Oklahoma.

In *Ecker v. Ecker*, 22 Okla. 873, we have a discussion of this identical section, viz.: "The second assignment of error urged is to that part of the master's report recommending that defendant be awarded, and to that part of the judgment awarding to defendant, one-half of plaintiff's property or one-half of its value. At common law a delinquent wife, on account of whose conduct the husband obtained a divorce, was not entitled to receive alimony, but in a number of the states, including the state of Arkansas, from which state the statutes in force in the Indian Territory were adopted, the common law has been modified by statute. The statute governing in this case reads: (The section of the statute quoted in the opinion is a verbatim copy of 2681, Kirby's Digest, under consideration in this case.) Under the language of this statute, or similar language of the statutes of other states, the courts have held that the authority of the court to make orders touching the alimony of the wife is not limited to those cases in which she prevails, or that whether the guilty wife will be granted alimony and the amount thereof is within the discretionary power of the court, to be controlled by the circumstances of each case. (Citing cases.) It is, however, a discretion that a court should at all times

exercise with a great care, and it should not be exercised in favor of the guilty wife when there are no mitigating circumstances. In the case at bar the wife is guilty of gross misconduct, but the husband has not been free from fault. The finding of the master is that the conduct of each party toward the other has been such as to render their living together as husband and wife intolerable. There is nothing in the master's report as to whom he finds the more culpable, except that he recommends that the husband be granted a divorce." The trial court ordered an equal division of the property or that defendant have judgment for one-half of the value of the same. This judgment was held erroneous, the holding being based on section 2568, enough of which is set out to show that that section is a duplicate of section 2684 in this case.

In *Pryor v. Pryor*, 88 Ark. 302, it is said: "The first question presented is whether or not the chancery court had jurisdiction to decree an allowance of alimony to a guilty wife against whom a decree for divorce was granted." The court then quotes from 2 Nelson, Divorce and Separation, sec. 907, where the question of the allowance of alimony to a wife, when the husband has obtained a divorce, is discussed along the same lines as the discussion in 1 R. C. L., above cited. The court then say: "A statute of this state provides that." The court here quotes section 2681, Kirby's Digest, and then adds: "Similar statutes in other states have been construed to have enlarged the powers of courts in divorce cases so as to empower them to allow alimony in any case, even to a guilty wife."

The above authorities clearly show just what the legislature intended when it enacted section 2681, viz.: That this section was enacted in order to permit the chancery courts of the state to award alimony to the wife in cases where the divorce was obtained at the suit of the husband on account of her misconduct. In such cases the legislature very properly left it to the court to make "such order touching the alimony of the wife and care of the children, if there be any, as from the circumstances of the parties

and the nature of the case shall be reasonable." But when, later on in the act, the legislature considers the question as to what a wife shall be entitled to receive when a divorce is granted to her against her husband for his wrongdoing, they enacted section 2684, above quoted. Otherwise, why do they use the language "where the divorce is granted to the wife," and the further expression, "and the wife so granted a divorce against the husband shall be entitled," etc. It is clear that the purpose of the legislature was that the amount which the wife should receive in such a case should not be enshrouded in any uncertainty by leaving it to the discretion of the court to say what should be a reasonable allowance to her, but fixed the amount, definitely, as to both the real and personal estate. There is nothing ambiguous in this section of the statute. Its terms are too plain to be misunderstood. It is clear, therefore, that the allegation in the petition in this suit that section 2684 of Kirby's Digest was the only statute in force in Arkansas, at the time of the trial of the suit there, which provided for the allowance of alimony in a case where a divorce was granted to the wife as against the husband is a correct statement of the law. Section 2681 has no application whatever to such a case. In this manner, and in no other, can effect be given to each of the two statutes under consideration. It will be seen that the allowance of alimony to the wife, when a divorce is granted for her fault, rests upon an entirely different basis than when the divorce is granted in her favor, and it is common in the United States, as above shown, to make that distinction by statute. There can be no doubt, therefore, that the general rule that a specific statute on a given subject will control as against a general statute that might include the same subject in the absence of a specific statute applies here, and that the statute quoted in our former opinion, being section 2684, controls the courts of Arkansas in all cases where a divorce is granted in favor of the wife. In such case the court is required to divide the personal property, to give her one-third thereof "abso-

lutely," and to give her a life estate of one-third of the husband's lands. The Arkansas court could not secure to the wife the use of real estate outside of the jurisdiction of the court.

In *Wood v. Wood*, 59 Ark. 441, 452, it is said: "Appellant did not undertake to show, in her original or amended bill for divorce, that she was entitled to the benefits of the act of March 2, 1891. Her original bill was filed before it was passed, and it was not amended thereafter in that respect. For the purpose of showing that she was entitled to considerable alimony, she alleged in the original bill that the defendant was not worth less than \$200,000, but did not say in what his estate consisted, or that it was within the jurisdiction of the court. No information is given to show that the court had the jurisdiction, by reason of the quality and location of the property, to set apart to her one-third of it under the act. It might have been real estate situate in another state. Nothing appears in the record, outside of the evidence, to show that the court committed an error of law in failing to divide the estate of the husband in accordance with the act."

We are unable to read that language of the court and reach any other conclusion than that the law of Arkansas limits the jurisdiction of a court of chancery in fixing alimony in a divorce case to property within the jurisdiction of the court. There was, then, just ground for the contention in the Arkansas court that that court had no jurisdiction to allow the wife alimony on account of the real estate of the husband in Nebraska. Was such a contention made? It is conceded, and the record before us clearly shows, that defendant did, with the help of able counsel, strenuously contend in the Arkansas court that that court could not in that case allow alimony to Bodie on account of the Nebraska lands. And the record also shows that the court did not in fact make any allowance on account of the Nebraska lands. It is shown by the overwhelming weight of the evidence before us that the Arkansas court allowed Bodie \$5,111 "in full of alimony

and all other demands set forth in the cross-bill." The only demand set forth in the cross-bill, outside of alimony, was the restoration to her of \$2,500 which she had loaned to Bates when they were living together as husband and wife. Deduct this sum from \$5,111, and it will be seen that the total amount allowed for alimony was \$2,611. Under the admissions of Bates and the uncontradicted evidence, he, at the time of the divorce trial, owned personal property and notes and mortgages within the jurisdiction of the Arkansas court, amounting in the aggregate to \$7,000, and a house and lot, also within the jurisdiction of the court, worth \$2,500. Under the statute Bodie was entitled "absolutely" to one-third of the \$7,000 of personal property, or \$2,333.33. She was also entitled to the present value of a one-third interest for life in the house and lot. If we figure that life interest at only \$278, it would make her statutory interest in the property of Bates, situated in Arkansas \$2,611, being the sum allowed as alimony by that court. Hence, it is idle to say that the chancellor considered the Nebraska land in fixing the amount of alimony. If he "considered" it, he considered it only to the extent of determining that he had no jurisdiction to take it into account in fixing the amount of alimony. It would be a travesty, not only upon the law, but upon the commonest principles of justice, for us to hold that the chancellor, when he decided the divorce case and allowed Bodie \$2,611 of alimony, took into consideration personal property of the value of \$7,000 and real estate to the value of \$2,500, located within the jurisdiction of his court, and also took into consideration the value of real estate in this state which the decree before us finds was worth \$40,000 at the time the chancellor in Arkansas tried that case. If, in addition to the property within his jurisdiction, he had also taken into account the present value of an estate for life in one-third of land in Nebraska, worth \$40,000, the amount which he would have been compelled to allow would have far exceeded the value of all the property which Bates owned in

Arkansas at that time. If he took into consideration the land in Nebraska, he was bound to consider it in the light of the law of Arkansas which would require him to allow her a life estate of one-third interest in the Nebraska land. He allowed her, all told, \$2,611. Further comment is unnecessary. *Res ipsa loquitur*.

From what has just been said, it will be seen that defendant succeeded in his contentions in the Arkansas court that that court was without jurisdiction, and prevented any allowance on account of the Nebraska land. He now, in this case, says that his contentions there were unwarranted, that the court did have jurisdiction, and by these inconsistent positions he insists that he has defeated the just claims of his wife. This, of course, he cannot be allowed to do.

In *Cross v. Levy*, 57 Miss. 634, it was held that a party who had agreed that a justice of the peace had jurisdiction of a case could not afterwards, as against the same party, contend that the justice did not have such jurisdiction. In *Long v. Lockman*, 135 Fed. 197, it was held that a party, who, in a suit in the district court of the Arkansas district, had alleged that the district court of the Colorado district had exclusive jurisdiction of the case and upon that contention had procured the case to be dismissed by the court of the Arkansas district, could not afterwards be heard to contend against the same party that the court of the Colorado district was without jurisdiction when sued in that district. The court said: "In my opinion, Williams in his lifetime was, and the administrator now is, estopped from denying that his residence was in Colorado when the petition herein was filed. * * * Every element of estoppel is in the evidence, and the evidence on that question is not in conflict. Williams, under oath, said his residence was in Colorado. He received the advantage from that oath. The petitioning creditors acted on it. They filed their petition here. They have incurred much expense by reason of that oath. It cannot now be controverted. * * * I pass those questions by, and hold that

this court has jurisdiction upon the grounds of estoppel. And that filing pleadings, offering evidence, making objections, obtaining rulings, and so forth, in one case, may be an estoppel in another case, see the following"—citing many cases. A party is estopped to deny facts pleaded to defeat jurisdiction of court. *Caldwell v. Morris*, 120 La. 879, 15 L. R. A. n. s. 423, and cases cited in note. He cannot in one litigation insist that the court has no jurisdiction of specified property and succeed in that contention, and afterwards in another litigation with the same parties insist that the court did have jurisdiction of that particular property and should have adjudicated it in the former action, and so defeat any adjudication thereof entirely.

Is the judgment in the Arkansas court *res judicata*? *Thomas v. Thomas*, 27 Okla. 784, construing an exactly similar statute, cites *Bowman v. Worthington*, *supra*, and quotes with approval the holding in that case above set out, and adds: "The trial court not possessing jurisdiction to entertain the question of the disposition of this property in the divorce proceeding, the same did not become *res adjudicata* by reason of that action, hence is left open for determination in this case."

Matson v. Poncin, 152 Ia. 569, holds: "A judgment to be available as an estoppel must have decided the particular matter involved in the later suit; it is not sufficient that the same question may have been determined."

In 1 Herman, Estoppel and Res Judicata, sec. 252, it is said: "The rule that estoppels must be certain to every intent, and precise and clear, is peculiarly applicable to estoppels by record and judicial proceedings; and, for this reason the record of a judgment must show with some degree of certainty the precise points determined, and not from inference or argument; and, where it gives no indications at all of what particular matters were adjudicated, it leaves the question unsettled, and is not available either as an estoppel or anything else, but merely evidence of its own existence. The conclusive effect of a judicial decision

cannot be extended by argument or implication to matters which were not determined. An estoppel by judgment is never inferred unless the basis on which it rests is such as to lead to the conclusion that the whole subject was litigated and adjudicated." See also, Wells, *Res Adjudicata*, sec. 223.

In *Packet Co. v. Sickles*, 72 U. S. 580, 592, it is said: "As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, when the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive, *per se*, it must appear, by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined—that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; and further, in cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence *allunde* consistent with the record may be received to prove the fact; but, even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded."

In *Russell v. Place*, 94 U. S. 606, the court, speaking through Mr. Justice Field, said: "It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record—as, for example, if it appear that several distinct matters may have

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been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered—the whole subject matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible.”

In *Mercer Co. v. City of Omaha*, 76 Neb. 289, the first paragraph of the syllabus holds: “The rule is well settled, both in this state and elsewhere, that a judgment is an estoppel only as to those matters actually in issue and tried and determined in the action in which it is rendered.”

Finally, we cite *Slater v. Skirring*, 51 Neb. 108. The opinion in this case was by Mr. Commissioner Irvine. It shows a very careful consideration by that talented commissioner of a plea of *res judicata*. Beginning on the fourth line from the bottom of page 112, it is said: “The general principles governing the pleading and proof of former judgments as estoppels are now quite well settled by so long a line of authorities that it is useless to review them. Generally speaking, in order that a judgment in one action shall operate as an estoppel in a second action, it must be made to appear not only that there was a substantial identity of issues, but that the issue as to which the estoppel is pleaded was in the former action actually determined; and, where the record is uncertain, parol evidence is admissible to show what issues were determined in the former suit (citing case), and we think that, while the authorities are conflicting, their greater weight is in favor of the view that the burden of proof is upon the party pleading the estoppel to establish the fact of the adjudication by extrinsic evidence if necessary, and not upon the other party to show that an issue which might have been adjudicated was not.”

Slater v. Skirving cast the burden in this case upon the defendant to sustain his plea by establishing the fact of the actual determination, in the former trial, of the issues involved here, and under the other authorities cited that proof must be clear to the extent of leaving no room for doubt.

Judge Humphreys, who presided at the trial of the case in Arkansas, was called as a witness in this case. He was interrogated as to whether he took into consideration any ownership or equity of Bates in the land in Nebraska. His answer was: "I think I did; it was my intention to cover the whole case." He stated that he was testifying from his best recollection, but a reading of his entire testimony will show that his recollection was not any too clear. Bates, himself, and Mr. Walker, his attorney at the Arkansas trial, both testified that the chancellor took the Nebraska land into consideration in determining the amount which should be allowed Bodie as alimony. This testimony is controverted by the testimony of Mr. Lindsey, Mr. Shannon, Judge McGill, and Judge Davidson, all of whom were present and participating in the trial as counsel for Bodie at the time the chancellor rendered his decision, and by Mr. Heaslet, clerk of the court of chancery in which the case was tried. These five witnesses all testified clearly and explicitly that the chancellor announced from the bench at the time he decided the case that he did not have jurisdiction over the Nebraska land, and could not consider the same. The four lawyers representing Bodie are gentlemen of high standing in the profession of the law, and, with the exception of Judge Davidson, have no present interest in the litigation. Mr. Heaslet was clerk of the court, and his testimony stamps him as a candid and truthful gentleman. There is nothing to show that he is in any manner interested in either of the parties to the suit, and it cannot be supposed that he would have any motive in giving testimony about a transaction in the court of which he was clerk, at variance with that given by his presiding judge. When you add to the

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testimony of these five witnesses the fact that the court could not have taken the Nebraska land into consideration in making his allowance, as hereinbefore shown, the district court before which the suit at bar was tried could not have done otherwise than to credit the testimony of the five witnesses, corroborated by the facts so clearly shown, and discredit the testimony of the three witnesses to the contrary. Under the evidence above set out and the authorities cited, it is clear that the record now before us sustains the allegations in the petition which our former judgment held stated a good cause of action, and fully sustains every point decided in our former opinion. There is therefore no reason why that opinion should be departed from or in anywise modified.

It is urged that the failure of Bodie to prosecute an appeal from the decree of the Arkansas court is a bar to the present suit. For the reasons above stated, this contention is without merit. The Arkansas court being without jurisdiction to take the Nebraska land into account in fixing the amount of alimony, and having refused so to do, its judgment was right, and an appeal would have been unavailing. There was nothing to appeal from. Nor is there any merit in the contention that the decree in this case does not give full faith and credit to the judgment of a sister state.

On the trial of this case the learned trial court followed our former decision. He was fully justified under the evidence in doing so, and we cannot, without violating every principle of law and justice, reverse his judgment. If he erred at all, it was in not allowing Bodie more than \$10,000.

The judgment of the district court dismissing the petition of intervention of the interveners is so clearly right that we shall not spend time discussing it.

The motion of plaintiff for an allowance of attorney's fees is overruled. The judgment of the district court is in all respects

AFFIRMED.

SEDGWICK, J., concurring.

No one denies that there was at least serious doubt as to the jurisdiction of the Arkansas court to give the wife anything on account of the Nebraska land. Their statutes expressly provided that, when the wife obtained the divorce, the court should give her one-third of the personal property and the use of one-third of the husband's real estate during her life. The court could not give her the use of real estate that was not within the jurisdiction of the court. That proposition was contested vigorously before the Arkansas court, the husband contending earnestly by his attorneys that the court could not give her anything on account of foreign land, and the court, as is demonstrated from the record, did not give her anything.

It appears conclusively from the record that the Arkansas court allowed her the money which she had loaned to the defendant, and the one-third of his personal property there in Arkansas, and the value of her life interest in the real estate that he had there. These items added together make the exact amount that the court allowed her, so that the record speaks for itself that the Arkansas court did not as a matter of fact give her anything on account of the York county land.

In *Cizek v. Cizek*, 76 Neb. 797, it was decided: "Under section 27, ch. 25, Comp. St. 1905, the district court has a continuing power, after a decree of divorce and alimony has been granted, to review and revise the provisions for alimony at its subsequent terms on petition of either of the parties." In the opinion the court said: "In the case at bar a good and sufficient reason is shown why the former decree for alimony should be modified. * * * Having demonstrated that the attempted adjudication of the court upon the question of alimony was nugatory and of no effect, he cannot now be heard to urge it is a final adjudication of the matter." So in this case the defendant on this trial insisted that the court could not give plaintiff anything on account of the Nebraska land. The

court did not give her anything. "He cannot now be heard to urge it as a final adjudication of the matter."

ROSE, J., dissenting.

The simple question presented by the appeal should have been determined as follows: An independent suit in equity to recover additional alimony based on defendant's ownership of land in Nebraska should be dismissed, where the uncontradicted evidence shows that plaintiff had procured a divorce and alimony in another state in a court having jurisdiction to consider the Nebraska land in awarding alimony, that both parties had appeared therein in person and by counsel, that each had asked for affirmative relief, and that the value of defendant's interest in the Nebraska land had been made the subject of pleading, proof and argument.

For the purpose of stripping from the controversy conflicting proofs relating to extraneous facts and confusing principles of law foreign to the issues, I prefer to make my own statement of the case.

Plaintiff had been the wife of defendant, and, in the court of chancery for Benton county, Arkansas, had procured a decree of divorce and alimony on a cross-bill filed by her in a divorce suit instituted by her husband. The Arkansas court granted the divorce March 2, 1911, allowing "\$5,111 in full of alimony and all other demands set forth in the cross-bill." From that judgment no appeal was taken. The petition in the present case was filed in the district court for York county, Nebraska, November 24, 1911. It contains the plea that defendant owns in York county, Nebraska, lands worth \$48,000, which the Arkansas court had no jurisdiction to, and did not, consider in awarding alimony. To the petition for additional alimony defendant demurred on the ground that the Arkansas decree is a bar to a further recovery and the plaintiff is defeated by estoppel, because she accepted and retained the fruits of the former adjudication. The trial court sustained the demurrer, and, from a dismissal of the action for additional alimony, plaintiff appealed to this court,

where it was held the petition showed on its face that the Arkansas court had no jurisdiction to, and did not, consider defendant's York county lands in awarding alimony. The dismissal, consequently, was reversed and the cause remanded for further proceedings. *Bodie v. Bates*, 95 Neb. 757. A trial on the merits of the case resulted in a decree awarding plaintiff additional alimony in the sum of \$10,000. Defendant has appealed.

The question raised may be stated as follows: Under the facts pleaded and proved in the present case, did the court of chancery of Benton county, Arkansas, have jurisdiction to consider the value of defendant's Nebraska lands in determining the amount of alimony to which plaintiff was entitled? If this inquiry should be answered in the affirmative, the question now in controversy was adjudicated in the former action for divorce. In that suit both parties appeared before the court in person and by counsel, each asking for affirmative relief. Defendant's interest in the York county land was there put in issue by the pleadings. Proof of its value was adduced at great length. Whether the Arkansas court, in determining the amount of plaintiff's alimony, had jurisdiction to consider defendant's Nebraska land in York county was a question argued at the trial of the action for a divorce.

It is the policy of the law to determine in one action litigable questions relating to divorce and alimony, unless the legislature has otherwise provided. Society's interest in proper domestic relations and the rights of parties to a suit for a divorce require a complete adjudication in a single action, where jurisdiction to sever marital relations and to adjust property rights exists. Owing to a controversy over the power of an Arkansas court to consider the value of Nebraska land in awarding alimony, the parties have been permitted to narrate in the courts of two states the unhappy and distressing incidents of their married life.

The former appeal presented the sufficiency of a petition alleging that the following provision of an Arkansas

statute was the only law of that state authorizing the allowance of alimony to a wife in case of a divorce.

"Where the divorce is granted to the wife, the court shall make an order that each party be restored to all property not disposed of at the commencement of the action which either party obtained from or through the other during the marriage and in consideration or by reason thereof; and the wife so granted a divorce against the husband shall be entitled to one-third of the husband's personal property absolutely, and one-third of all the lands whereof her husband was seised of an estate of inheritance at any time during the marriage for her life, unless the same shall have been relinquished by her in legal form." Kirby's Digest of the Statutes (1904) sec. 2684.

After the case had been remanded to the district court, defendant pleaded and proved another Arkansas statute containing these words: "When a decree shall be entered, the court shall make such order touching the alimony of the wife and care of the children, if there be any, as from the circumstances of the parties and the nature of the case shall be reasonable." Kirby's Digest of the Statutes (1904) sec. 2681.

This statute, authorizing divorce courts to award alimony according to the circumstances, uses general terms applying to all cases. It confers on the divorce courts of Arkansas the power of similar courts throughout the country. That act was passed long before the enactment invoked by the majority to narrow the jurisdiction of divorce courts. The earlier statute is in full force according to its original import, since it has not been changed, modified or amended in a manner authorized by the constitution of Arkansas. The statutes may be construed together without doing violence to the rules of statutory construction. Both may be enforced. Under the earlier act, reasonable alimony may be determined from the circumstances of the parties and the nature of the case. For that purpose, land outside of Arkansas may be considered. Inquiry into general equity power of divorce courts of Arkansas is therefore immaterial. By proper pleadings

and proofs the facts relating to defendant's interest in the Nebraska lands were presented to the Arkansas court. If they were not in fact considered, plaintiff had her remedy by appeal to the supreme court of that state. In any event the question now determined was formerly adjudicated, according to principles of law properly settled. There is no Arkansas precedent to the contrary.

In *Fischli v. Fischli*, 1 Blackf. (Ind.) 360, the report shows that plaintiff procured a divorce from her husband in Kentucky, where the statute provided that the wife should have a specific share of his property. Subsequently she brought an action in Indiana for additional alimony based on property owned by defendant in that state. A demurrer to the petition was sustained, the court saying:

"This divorce having been granted in Kentucky, and a part of the husband's property decreed to the wife, it is important for us to know how far the rights of the parties, with regard to the provision made for the wife, were adjudicated and determined by the proceedings which were had in that state. For whenever a matter is adjudicated, and finally determined, by a competent tribunal, it is considered as forever at rest. This is a principle upon which the repose of society materially depends; and it therefore prevails, with a very few exceptions, throughout the civilized world. This principle not only embraces what actually was determined, but also extends to every other matter which the parties might have litigated in the case. * * * Guided by this principle, we should naturally suppose that the decree of the circuit court in Kentucky had done all that equity and justice required between the parties, if there is nothing in the record of their proceedings to evince the contrary, nor anything in the case to limit their authority; and that the rights of the parties, being thus determined, were subject to no further litigation. The separate maintenance that should be decreed to the wife out of the husband's property, according to her condition in life, the fortune she brought, and her husband's circumstances, was the subject matter of

adjudication before the court that granted the divorce; and if that tribunal had the power to do ample justice between the parties, but has failed to do it, no other tribunal can take cognizance of the subject, and supply the deficiency." See, also, *McCormick v. McCormick*, 82 Kan. 31.

The decision of the majority that the general statutory power of the Arkansas divorce court to award the wife reasonable alimony, upon the granting of a divorce, applies alone to cases wherein the husband obtains the decree is not warranted by the language or intention of the lawmakers or by any construction of the supreme court of Arkansas. The earlier Arkansas statute was adopted in the Indian Territory.

In *Ecker v. Ecker*, 22 Okla. 873, it was argued that this section did not authorize a court to grant alimony to a wife when the divorce was granted to the husband for her misconduct. The supreme court of Oklahoma said: "Under the language of this statute, or similar language of the statutes of other states, the courts have held that the authority of the court to make orders touching the alimony of the wife is not limited to those cases in which she prevails, or that whether the guilty wife will be granted alimony and the amount thereof is within the discretionary power of the court, to be controlled by the circumstances of each case."

Adams v. Adams, 30 Okla. 327, is to the same effect.

In the majority opinion, an estoppel not well pleaded or properly proved is substituted for a technical plea of *res judicata*. The law on both subjects is confused in disregard of the following observation in *Hanson v. Hanson*, 64 Neb. 506: "Considerable obscurity may be avoided by keeping in mind the distinction between a judgment, urged as a technical bar to another action, and one that is urged as conclusive as to some one or more points tried and determined in a former action."

In affirming the judgment allowing plaintiff additional alimony in the sum of \$10,000, a technical plea of *res judicata* established by uncontradicted evidence has been

disregarded without ending the litigation for alimony. The record shows that defendant has property in Oklahoma. If the decision is right, he may be pursued in that state for still further alimony and in other states where he may have additional property. The decision of the Arkansas court has been reviewed here. Full credit has not been given to the judgment of the court of another state. The decree for additional alimony should be reversed and the action dismissed.

BARNES and LETTON, JJ., concur in this dissent.

IN RE ESTATE OF JOHN JOHNSON.
JULIA JOHNSON, EXECUTRIX, APPELLANT.

FILED JANUARY 15, 1916. No. 19391.

1. **Constitutional Law: DEFINITIVE STATUTE: "WEEK."** The act of 1915 (Laws 1915, ch. 222) is a general act defining the word "week" as used in our laws, and is not unconstitutional as an attempt to control judicial actions.
2. **Wills: PROBATE: NOTICE.** The act was not intended to change the construction of former statutes which provide for publication of notices in weekly papers.

OPINION on motion for rehearing of case reported in 98 Neb. 799. *Former judgment of affirmance vacated, and judgment of district court reversed, with directions.*

SEDGWICK, J.

Upon the motion for rehearing in this case, briefs have been filed by the attorneys involved, and also several briefs have been filed by attorneys interested in the general question involved. It is strenuously argued that the statute is unconstitutional. It is said in the brief: "The court in the case at bar erroneously concedes to the legislature the unlawful power to change the judicial construction of the existing will statute (Rev. St. 1913, sec.

1303) and to overrule *Alexander v. Alexander*, 26 Neb. 68, by legislative mandate." In the *Alexander* case the notice of probate of will was published less than 21 days, and the court held that a publication once a week for three weeks was sufficient. Under this new statute as now construed, the publication is held to be insufficient, and in an entirely similar case the same statute that was construed in the *Alexander* case is construed differently. The argument in the brief is that the legislature has no jurisdiction to direct this court to change the construction of an existing statute, and the following is quoted from the decision in *Lincoln Building & Saving Ass'n v. Graham*, 7 Neb. 173: "An expository statute, which is substantially in the nature of a mandate to the courts to construe and apply a former law, not according to judicial, but according to legislative judgment, is inoperative, and cannot control the courts in interpreting the law and declaring what it is."

The language of the statute we are construing and of the title to the act furnish some ground for the contention that the statute is unconstitutional for the reason above stated. It says what the term "weeks" shall be construed to mean, and the title of the act is to define the word "week," but this is an entirely different thing from specifying and construing a particular statute. A general law that a week in the publication of legal notices shall always be seven full days would, if valid, of course change the holding of the court in many cases in the construction of various statutes, and indirectly tend to give a different meaning to many statutes from the meaning which the court has already given them; but it is a general statute, applying in all cases, and does not enact that the court shall construe a certain statute in a certain way, but provides what shall constitute a week in the state in regard to the publication of notices. Formerly the courts were very technical in holding statutes unconstitutional, but the courts are not now looking for excuses to declare laws unconstitutional, but are seeking to avoid that un-

pleasant duty whenever they can, and this case is so different from the *Graham* case above cited that it ought to be distinguished for the purpose of upholding and enforcing a legislative enactment. The statute (Laws 1915, ch. 222) to be construed is not plain and unequivocal, and the intention of the legislature is not easily discovered. It provides that when legal notices are required to be published "any number of weeks, or for any number of weeks, the term 'week' shall be construed to mean either a period of time known as a calendar week beginning on Sunday and ending with Saturday, or any period of seven consecutive days beginning with the date of the first publication of notice."

Our former opinion construes this statute to mean that in no case will the publication be complete until the full number of weeks of at least seven days each have elapsed after the first publication. The statute would have this meaning if it simply read "a period of seven consecutive days beginning with the date of the first publication of notice," and omitted the other clause referring to calendar week, so that the clause referring to calendar week seems to have no force or effect in the statute as we have construed it. This court had decided that when a statute provided that a notice should be published three weeks successively, publication on any day during each week, if in a weekly paper, would be complete upon the last publication, but in a semiweekly paper it would not be complete until it had been published twice in each of the required number of weeks. Some statutes provided that the legal notice should be published for a certain number of weeks; some omitted the word "for" and provided that they should be inserted in a paper three successive weeks, with different variations of these several wordings, so that the decisions of the court became diverse and perhaps inconsistent. If it was the intention of the legislature to simply provide that in all publications a week should be full seven days, and that three or four weeks' publication must be three or four full weeks of seven days each after the

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first publication, it was unfortunate that the statute was passed with an emergency clause. It would naturally follow that publications in the meantime after the statute took effect and before it was published would disregard the change in the law. If this statute which we are construing now omitted the expression "a period of time known as a calendar week beginning on Sunday and ending with Saturday," there would of course be no ground to doubt of its meaning. What, then, was the purpose of inserting that clause in this statute? We must give force and meaning to this expression, if possible. Prior to the enactment of this statute it was held that, when the publication was in a semiweekly or triweekly paper, one publication alone in any week was not counted. A notice could not be considered as published a week unless published in every issue of the paper in that week. If the purpose of the legislature was to remedy this condition, which the clause defining a week a "period of seven consecutive days beginning with the date of the first publication of notice," indicates, it might be considered that the clause referring to a calendar week was inserted as recognizing the existing condition of the statutes regulating publications in weekly papers. That is, these two clauses, taken together, were intended to continue the law as it had been construed as to publications in weekly papers, so that a notice published once in a weekly paper is a compliance with that statute for that week.

The sole purpose, then, of this statute is to provide for publications in other than weekly papers. When we consider the effect of the emergency clause, it seems still more probable that it was not intended by the legislature to extend the required time of publication in weekly papers without notice to those who might make such publications before the new statute should be published. Other publications generally, if complying with the former statutes, would be valid under this act. While the matter is unfortunately not free from doubt, we have concluded that this statute does not affect publications in weekly papers,

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and such publication will be controlled by former statutes as heretofore considered.

Our former judgment is vacated, and the judgment of the district court is reversed, with instructions to enter a judgment reversing the judgment of the county court.

REVERSED.

FAWCETT, J., dissenting.

In my judgment the majority opinion constitutes a judicial amendment of chapter 222, Laws 1915. In our former opinion (98 Neb. 799) it is stated: "We think this act of the legislature is clear and unmistakable in its terms and relieves the situation of all doubt as to the construction which must be given to statutes of the kind therein referred to, and that section 1303, Rev. St. 1913, is clearly one of the statutes contemplated." Nothing has been said in the briefs on rehearing or in the majority opinion which, in my judgment, should cause us to change that construction of the statute referred to. I concede that it is unfortunate that the legislature passed chapter 222 with an emergency clause. It was bad judgment. But my idea of the law is that the question as to whether the legislature uses good or bad judgment in the passage of an act is not one for review by the court. I think our former judgment should be adhered to.

LETTON, J., joins in dissent.

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KATHERINE FERBER, APPELLANT, v. JOHN MCQUILLEN.
APPELLEE.

FILED FEBRUARY 5, 1916. No. 18354.

1. **Adverse Possession: APPEAL: SUFFICIENCY OF EVIDENCE.** Where a railroad company succeeds to the interest of a grantee in a void tax deed covering a vacant town lot lying contiguous to its right of way, pays the taxes assessed thereon for nearly 30 years, and exercises the same jurisdiction over it as over other parts of its right of way and property at that point on its line, a verdict of a jury holding in effect that its title has become absolute will be sustained.

APPEAL from the district court for Dixon county; GUY T. GRAVES, JUDGE. *Affirmed.*

J. F. Boyd, R. J. Millard, Edward E. Baron and W. L. Harding, for appellant.

J. J. McCarthy, contra.

MORRISSEY, C. J.

This was an action of ejectment brought in the district court for Dixon county; the real estate involved being lot 4 in block 49 of the city of Ponca. Originally this lot was owned by the Nebraska Land & Town Lot Company, a corporation. The owner failed to pay the taxes for the year 1879 and subsequent years, and in 1882 a tax deed was issued therefor. By quitclaim deed the grantee in the tax deed conveyed the lot to the Chicago, St. Paul, Minneapolis & Omaha Railway Company, which now claims to be the owner thereof, and is the real defendant; the defendant named herein being the lessee of that company. During all of the years intervening between the issuance of the tax deed and the filing of this suit in 1911 the railroad company paid the taxes on the lot. December 30, 1910, for the consideration of one dollar, plaintiff procured a quitclaim deed for lot 4, as well as other lots that are not herein in-

volved, from the old town-site company, which had long since abandoned the property. Defendant claims under his lease from the railroad company. It is conceded that the tax deed was technically defective, and the issue is whether the railroad company had acquired title by adverse possession for a period of more than ten years. This issue was submitted to the jury, which found for defendant. No error in the instructions or in the conduct of the trial is pointed out, but we are asked to set aside the verdict because it is not sustained by sufficient evidence.

The lot lies contiguous to the right of way of the railroad company. For many years it has been taxed in connection with the railroad company's right of way, and the evidence indicates that it has been treated by the company as forming a part of its right of way. The original owner completely abandoned it for 30 years, and then for the consideration of one dollar made a quitclaim deed to the plaintiff. The testimony as to possession is somewhat hazy. The section-men mowed the weeds that grew on the lot; they also piled ties there from time to time; and a witness testified that from the year 1885 to 1909 he and his father were in the lumber and coal business and occupied lots in this block. While the witness is unable to give the exact location of the lot lines, his testimony shows that one or two of their buildings were located to the west of this lot and another was located to the east of it, and that this lot was used in connection with the lots on which their buildings stood. He also testifies positively that they had a lease to the ground on which their buildings stood, but is unable to give the numbers of the lots covered by the lease. He does not remember whether the lease was a verbal or written one, but from his testimony it is clear that this lot was necessarily used at least as a right of way between the buildings used by this witness. He is unable to testify very definitely about the rental, but is positive that a part of the time at least they paid rent to the railroad company, and that they had permission to put their buildings there.

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"A void tax deed affords color of title in an action of ejectment in which adverse possession of real estate for the statutory period of ten years is relied upon as a defense." *Twohig v. Leamer*, 48 Neb. 247.

To determine the acts necessary to constitute adverse possession it is sometimes necessary to take into consideration the character of the property and the purposes for which it is suitable. The testimony covers a period of 30 years, and the only use made of the property was to furnish a place for piling railroad material, a roadway for the lumber and coal dealers having sheds on the railroad property, and finally serving as a roadway or approach for a grain elevator, except that for a few years plaintiff's husband had part of it inclosed as a corral for his cow. But he made no claim to ownership. The use to which it was put was entirely consistent with the railroad company's claim of ownership. The property was abandoned by the owner; it was taken over under a tax deed, and the taxes paid thereon by the railroad company; for nearly 30 years it was treated like the other property making up the railroad right of way, and the railroad company's ownership was recognized by the people who operated the coal and lumber business there. Prior to the beginning of this suit a grain elevator was built on one of the adjoining lots, and the owner of the elevator recognized the ownership and possession of the railroad company and procured permission to use the lot for an approach to the elevator.

After an examination of the whole record, we are of the opinion that the evidence is sufficient to sustain the verdict of the jury, and the judgment is

AFFIRMED.

LETTON, J., not sitting.

EDWARD IRWIN, APPELLEE, v. F. P. GOULD & SON,
APPELLANT.

FILED FEBRUARY 5, 1916. No. 18480.

1. **Master and Servant: INJURY TO SERVANT: PLEADING: FELLOW SERVANTS.** In an action for personal injuries by a servant against the master, it is not necessary to allege in the petition that plaintiff and defendant's servants charged with the negligence alleged were not fellow servants, if the petition sets up facts from which such conclusion necessarily follows.
2. **Appeal: PLEADING.** Where the sufficiency of a petition is attacked for the first time in this court, it will, when possible, be sustained.
3. **Master and Servant: FELLOW SERVANTS.** "Employment in the service of a common master is not alone sufficient to constitute two men fellow servants within the rule exempting the master from liability to one for injuries caused by the negligence of the other. To make the rule applicable there must be some consociation in the same department of duty or line of employment." *Union P. R. Co. v. Erickson*, 41 Neb. 1.

APPEAL from the district court for Douglas county:
ABRAHAM L. SUTTON, JUDGE. *Affirmed.*

Gurley, Woodrough & Fitch, for appellant.

W. R. Patrick and C. J. Southard, contra.

MORRISSEY, C. J.

Action for personal injuries received by plaintiff while in defendant's employ as the operator of a concrete mortar mixing machine. Defendant was a building contractor engaged in erecting a concrete structure. It is alleged that, while plaintiff was performing his duties as a mortar mixer, the defendant, "by and through its foreman and employees, carelessly and negligently permitted a heavy plank * * * to fall from the platform or cage of a steam hoist used by the defendant in the construction of said building, from a height of about 100 feet, and strike plaintiff upon the instep of his left foot," crushing the same and render-

ing immediate amputation necessary. From a judgment in favor of plaintiff, defendant appeals.

Defendant first asserts that the petition does not state a cause of action; that it was incumbent upon the plaintiff to plead that the accident was not due to the negligence of a fellow servant. The claim is made that the allegation of the petition that "the defendant, by and through its foreman and employees, carelessly and negligently permitted" the plank to fall is insufficient, and this is especially urged because the evidence shows that the foreman was not present when the accident occurred. Preceding the clause complained of, the petition specifically alleges the character of plaintiff's employment. It sets out the work he was employed to do, and was doing, when the accident occurred. It also shows that the plank was permitted to fall "from the platform or cage * * * from a height of about 100 feet."

"In an action for personal injuries by a servant against his master, the declaration may allege either that the plaintiff and the defendant's servant charged with the negligence in question were not fellow servants, or such declaration may set up the facts from which such conclusion necessarily follows." *Bennett v. Chicago City R. Co.*, 141 Ill. App. 560.

Had plaintiff alleged that he and the men handling the plank were not fellow servants, it would have been but the statement of a mere conclusion. He followed the better course by pleading the facts.

Appellant relies upon the rule announced in *Norfolk Beet-Sugar Co. v. Koch*, 52 Neb. 197, but in that case the question did not arise on the pleadings, but on the evidence, and the jury were asked to say whether the relation of fellow servant existed, and answered, "We don't know," and the court held a general verdict in favor of the plaintiff was not sustained.

In the instant case, the petition was not attacked in the lower court by either motion or demurrer, nor any defense based upon the fellow-servant doctrine pleaded in the an-

swer. It may be upheld under the rule stated in *Bennett v. Chicago City R. Co.*, *supra*, or the long-established rule that, when timely objection is not made, pleadings, when possible, will be sustained.

It is next urged that the court ought to have instructed a verdict for defendant because plaintiff and the men handling the plank were fellow servants, and that there was a failure to prove that defendant permitted the plank to fall, and that if it did fall, as claimed by plaintiff, the men responsible for the act were his fellow servants.

Plaintiff was engaged in operating his machine, which was located on the ground about 40 feet west of the foundation of the hoist, while other employees of the defendant were on the sixth floor of the building engaged in loading planks onto the hoist and lowering them to the ground. It does not appear that they were within his view or that he had any opportunity to observe them or see the manner in which they were doing the work. His work was entirely separate and distinct from theirs, although they were under the same foreman.

In *Union P. R. Co. v. Erickson*, 41 Neb. 1, there is a full discussion of the fellow-servant question, and the rule in force in this state is therein laid down, viz.: "Employment in the service of a common master is not alone sufficient to constitute two men fellow servants within the rule exempting the master from liability to one for injuries caused by the negligence of the other. To make the rule applicable there must be some consociation in the same department of duty or line of employment." There was no consociation between the plaintiff and the men operating the hoist, and the rule of fellow servant does not apply.

The evidence is amply sufficient to warrant the court in submitting the case to the jury. One of the men who was handling the plank testified that he handed a plank like the one which struck plaintiff's foot to his coworker, whose duty it was to place it on the hoist. A workman on the fifth story testified that he saw a plank fall down the shaft. Witnesses testified to finding a broken cross-timber of the

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hoist which was apparently struck by the plank as it descended to the ground. According to the theory of the plaintiff, this cross-timber split the plank and deflected one part thereof so that it caused the injury to plaintiff. The man who was loading the planks onto the hoist denied dropping any plank, and denied all knowledge of any falling from the hoist; but this question was properly submitted to the jury, and its verdict seems to be the only one which would be warranted under the evidence.

Complaint is made of an instruction in which it is claimed that the burden of proof was shifted from plaintiff to defendant, but the instruction does not bear the interpretation which defendant attempts to place upon it, nor is it subject to the criticism made.

No error prejudicial to the rights of defendant is found in the record, and the judgment is

AFFIRMED.

PETER E. MILLER ET AL., APPELLANTS, v. W. C. WENTZ COMPANY ET AL., APPELLANTS; EMIL J. KREMER, APPELLEE.

FILED FEBRUARY 5, 1916. No. 18582.

1. **Deeds: SETTING ASIDE.** Courts hesitate to set aside deeds merely because of the mental weakness of the grantor, where a total want of reason is not shown. But where mental weakness exists, and misrepresentation on the part of the grantee, or those in privity with him, is shown, a court of equity will, in a proper case, grant relief.
2. **Vendor and Purchaser: BONA FIDE PURCHASERS: EVIDENCE.** Evidence set out in the opinion *held* sufficient to show that defendants Barnes and Wentz were not *bona fide* purchasers for value.

APPEAL from the district court for Hamilton county:
GEORGE F. CORCORAN, JUDGE. *Affirmed, with directions.*

Hainer, Craft & Edgerton, W. A. Prince and W. G. Hastings, for appellants.

J. H. Grosvenor, contra.

MORRISSEY, C. J.

This is a suit in equity to set aside deeds of conveyance covering a farm of 160 acres, a five-acre tract in the suburbs of the city of Aurora, and a house and lot located in that city, all of the property being in Hamilton county, Nebraska. The suit was brought by Peter E. Miller through his guardian and next friend, and by Mrs. Miller for herself. Anna Poole intervened, but her interests are not herein involved and no further reference will be made to her. On and prior to May 29, 1913, Peter E. Miller was the owner of this real estate. The family lived in the city, at least a part of the time, but operated the farm and the five-acre tract. The defendants Wentz were engaged in the real estate business in Aurora; the defendants Adams were of the same occupation, with their principal place of business in Colorado; defendant Barnes lived in Aurora and appears to have been a subagent for Adams, while the defendant Kremer was a farmer living in Hamilton county.

Through the solicitation of defendants Adams and their agent, Barnes, Miller was induced to go to Colorado to look over land with the view of trading some of his Hamilton county property therefor. No trade, however, was made following his first visit to Colorado; but a few days later Miller, in company with his 16 year old boy and the defendant Barnes, again went to Colorado, and this time he inspected a section of land, which was represented as the property of E. E. Adams. While in Colorado a contract was drawn up whereby Miller agreed to transfer the Hamilton county real estate for this section of Colorado land, and give a mortgage back on the Colorado land for something in excess of \$3,000. Miller and Barnes then returned to Aurora, and Mrs. Miller affixed her signature to the contract. For the purposes of the trade it was agreed that Miller's farm should be put in at the gross price of \$20,000,

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and that there should be deducted therefrom the amount of the mortgage then resting as a lien thereon in the sum of \$6,000. The agreed price of the five-acre tract was \$2,350, which was represented to be clear of incumbrance, and the city property was put in at an agreed price of \$4,500, subject to a mortgage of \$1,500, which was to be deducted from the gross amount. Adams' Colorado property was put in at \$35 an acre, or a gross amount of \$22,400, and was to be free and clear of incumbrance. It was agreed that the difference, \$3,050, should be covered by Miller executing and delivering to Adams a note secured by mortgage on the Colorado property for the amount. It was agreed that Miller should retain possession of the farm until March 1, 1914, but pay as rent therefor one-fourth of the crops raised; that possession of the other property should be surrendered upon the execution and delivery of the deeds. This contract bears date May 17, 1913, and on May 29 following Miller and wife executed deeds conveying all of their property heretofore described, and accepted a deed to the Colorado property, and executed a note for \$3,200 secured by mortgage on the Colorado property. Adams was not the owner of this land, as stated in the contract he made with Miller, but it was owned by one Cummings, who executed a deed therefor and sent it to a bank in Aurora, with the name of the grantee blank, and with instructions that it be delivered upon payment of \$8,400.

Adams had come to Aurora and arranged with defendants Wentz to pay this money to the bank for the Cummings deed and to take over the Miller farm at the agreed price of \$14,400. The farm being subject to a \$6,000 mortgage, it was necessary for Wentz to advance only the amount required to take up the Cummings deed. This he did, and Miller executed a deed conveying the farm to Wentz. By an arrangement between Adams and Barnes, the five-acre tract was deeded by Miller to Barnes. It is said that the consideration was \$1,700 or \$1,800, about one-third of which was paid in commissions due from Ad-

ams to Barnes; a part being a commission on this Nebraska trade. Kremer was in no way connected with the trades, but was in the market for a residence property, and was shown this property by Wentz and induced to buy at an agreed price of \$3,500, and the Millers delivered him a deed to that property. These deeds were all made and delivered on May 29, 1913. In July following this suit was instituted.

The petition alleges that the contract and deeds were obtained by fraud, misrepresentation and undue influence practiced upon Peter E. Miller, who was mentally incompetent. The defendants Wentz deny the allegations of fraud and undue influence and the incompetency of Miller, and as an affirmative defense claim to be *bona fide* purchasers for value; that plaintiffs, having executed the deed and accepted a lease from them to the farm, are estopped from assailing their title. Barnes denied generally the allegations of fraud, undue influence and mental incompetency of Miller, and claimed to be a *bona fide* purchaser for value without notice or claim of fraud. Kremer also claimed to be a *bona fide* purchaser, and that he purchased the property through his codefendants Wentz and paid therefor its full value. The court entered a decree setting aside the deeds to the farm and the five-acre tract, but sustaining the deed covering the city property. Defendants Wentz have appealed from so much of the decree as affects the farm; Barnes has appealed from the decree as affecting the five-acre tract; and plaintiffs have appealed from so much of the decree as covers the city property.

The first thing to determine is the mental capacity of Miller. There is little conflict in the testimony as to his condition up to the time these trades were made; but, of course, different minds may draw different conclusions. He had lived in Hamilton county about four years prior to this trade, and many of his neighbors were called as witnesses. It would serve no useful purpose to quote their

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testimony. It is conceded by every witness that he was not of normal mentality. Yet with the advice and assistance of his wife he had transacted a large amount of business and appears to have been reasonably successful. He inherited property in Illinois. He sold that at a good figure and brought the proceeds to Nebraska and made an advantageous investment. It was agreed between all parties that the question of his mental condition should be submitted to a board of nine experts. This board made the following report:

"Alienists' Report.

"Aurora, Neb., Oct. 21, 1913.

"We, the undersigned, physicians summoned to testify in the case of *Miller et al. v. Wentz et al.*, do hereby certify that after a careful, thorough and painstaking examination, we are of the opinion that the plaintiff, Peter E. Miller, is a feeble-minded individual, or in other words an imbecile of not the highest grade. We find that Peter E. Miller is mentally and physically deficient; that we would denominate him feeble-minded. We believe that he is not insane, meaning by this that there has been no perversion in his mental functions from his normal, which has always been deficient. We believe that he is able to carry on the ordinary, simple duties of life. The question of his ability to accomplish the greater matters of business must necessarily depend upon the influences which are brought to bear and the impress which they have upon one who is not as strong mentally as the average human individual.

"Joseph M. Aikin, M. D.

"F. E. Coulter, M. D.

"W. B. Kern, M. D.

"Benj. F. Bailey, M. D.

"L. B. Pilsbury, M. D.

"E. A. Steenberg, M. D.

"D. S. Woodard, M. D.

"We, the undersigned, dissent from the word 'imbecile,' but concur in the statement that he is physically

and mentally defective, and indorse the remainder of the majority report.

“W. D. Guttery, M. D.

“M. W. Baxter, M. D.”

Giving proper credit to this report, which is in harmony with the testimony of the lay witnesses, we must determine whether he was able to meet on fair terms the experienced real estate men with whom he had to cope. To determine this question, we are not compelled to rely alone on the testimony offered as to his mental capacity. We may consider the facts admitted, or established beyond all controversy, and their relation to and bearing upon the question under consideration. In fixing the price of the property, the Colorado land was priced at \$35 an acre. This is conceded to be more than it was worth. Plaintiff's property was also priced at a value in excess of its true worth, and this practice is not uncommon in the exchange of property. But as deeds to these properties were all exchanged on May 29, we may consider the prices realized as determining their values. Mr. Cummings, the owner of the Colorado land, realized but \$8,400, \$3,200 of which under the arrangement with Adams was paid by the note and mortgage executed by Miller. The equity in Miller's farm sold to defendants Wentz for \$8,400. The city property sold to Kremer for \$3,500, and the acre property to defendant Barnes for \$1,700. Even on these figures Miller lost by the transaction \$5,200. It is contended, and we think fairly shown by the evidence, that Miller's property was actually worth more than the prices paid by Wentz, Barnes and Kremer. This transaction for a man in his station in life may be termed one of these “greater matters of business” mentioned by the alienists.

In view of the circumstances, we are convinced that Miller was not capable of comprehending fully the nature and effect of the transaction, and was unfitted to attend to business of such importance as the trade of his entire real estate holdings for property he had seen but once, and then only under the watchful eye of the trained broker.

Courts hesitate to set aside deeds merely because of the weakness of mind of the grantor, where a total want of reason is not shown. But where mental weakness exists and misrepresentation is shown, a court of equity will grant relief and set aside a deed which has been secured through the fraud and undue influence of the grantee. "The acts and contracts of persons who are of weak understandings, and who are thereby liable to imposition, will be held void in courts of equity, if the nature of the act or contract justify the conclusion that the party has not exercised a deliberate judgment, but that he has been imposed upon, circumvented, or overcome by cunning, or artifice, or undue influence." 1 Story, Equity Jurisprudence (13th ed.) sec. 238. *Allore v. Jewell*, 94 U. S. 506.

Defendant Barnes had full knowledge of the entire transaction and was credited with a commission for bringing about the trade. He took title with full knowledge of the misrepresentation that had been made to Miller, and is in no sense to be considered an innocent purchaser for value. The defendants Wentz, it is true, are not shown to have knowledge of the value of the Colorado property, but they did have knowledge of the contract made between Miller and Adams. This contract showed that the land was represented as being the property of Adams, and was being put in on the trade at \$35 an acre. They also knew that the property did not belong to Adams, but to Cummings, and that Cummings was receiving only \$13 an acre. As experienced real estate dealers they must have known that its value was not far in excess of the amount for which its owner had it listed upon the market. With knowledge of these facts they advanced the money to buy the Cummings land, and, as a part of the same arrangement and agreement between themselves and Adams, they took this deed, Miller's name was filled in as grantee, and Miller was induced to deed his farm to Wentz. Defendants Wentz stepped into Adams' shoes and assisted in carrying to completion the contract secured by the misrepresentation and fraud of Adams, and they cannot be held to be

innocent purchasers for value. Inasmuch as the defendants Barnes and Wentz voluntarily took Adams' place in carrying out the terms of the written contract, they took their deeds subject to all the infirmities that would have come with them had the deeds been made to Adams. *Thomas v. Sweet*, 111 Ky. 467.

The point is made by counsel for Wentz that plaintiff accepted a lease from them and was in possession of the farm under this lease at the time suit was brought, and cites authority holding that the tenant while in possession may not question the landlord's title. But the facts in this case do not bring us within that well-established rule. When the contract was made for the exchange of the properties, it was provided therein that Miller should retain possession of the farm for the remainder of that year, paying as rental therefor one-fourth of the crop. In place of writing this provision in the deed of conveyance from Miller, it was put in a separate paper in the form of a lease, and this appears to have been done on the suggestion of Wentz, who desired and insisted that the original contract be surrendered. By changing the evidence of this agreement, they did not change the true status of the parties, and Miller is not estopped because he accepted this lease and surrendered the old contract.

Defendant Kremer had no notice that any fraud or imposition had been imposed upon Miller. He was in the market for a residence property. This property was offered for sale, and he bought without anything to arouse a suspicion of unfair dealing. He appears to have been a purchaser in good faith for a valuable consideration, and his title will not be disturbed. Plaintiffs offered to do equity by conveying the title to the Colorado property to whomsoever the court might order, but no order in relation thereto was made.

The judgment is affirmed, but the district court is directed to ascertain and determine the value of Miller's equity in the house and lot at the date of the transfer to Kremer, and if defendants Wentz pay the amount so found

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as the value of the equity into court for the benefit of plaintiff within 30 days from the entry of the order, plaintiffs be directed to convey such equity as they hold in the Colorado land to them by quitclaim deed.

AFFIRMED, WITH DIRECTIONS.

LETTON, J., not sitting.

ANDREW J. SAWYER ET AL., APPELLANTS, v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE.

FILED FEBRUARY 5, 1916. No. 18566.

1. **Waters: FLOOD WATERS: ACTION FOR DAMAGES: REVIEW.** In an action to recover damages to lands, claimed to have been sustained by the negligent construction of railroad grades, bridges, yards, embankments and tracks, which were alleged to have held back the flood waters of Salt creek on plaintiffs' lands for such a length of time as to destroy a permanent stand of blue grass and alfalfa growing thereon, the verdict of a jury will not be set aside if it is sustained by competent evidence.
2. **Instructions examined and found to contain no reversible error.**

APPEAL from the district court for Lancaster county:
P. JAMES COSGRAVE, JUDGE. *Affirmed.*

Lincoln Frost, A. J. Sawyer, N. Z. Snell and W. B. Comstock, for appellants.

Byron Clark, Jesse L. Root and Strode & Beghtol, contra.

BARNES, J.

Plaintiffs commenced this action to recover damages, to both personal property and certain real estate, alleged to have been caused by the flood of July 5 and 6, 1908.

The petition alleged, in substance, that the defendant railroad company negligently constructed its bridges, grades, railroad yards, tracks and other improvements across the

streams and in the basin into which they flowed just west of the city of Lincoln, and thereby caused the flood waters to overflow plaintiffs' lands and remain thereon a sufficient length of time to drown out, kill and destroy the plaintiffs' blue grass and alfalfa growing thereon, and wash away, injure and destroy the fences, outbuildings, and other personal property situated on their said lands. The pleadings were amended from time to time before the trial of the cause, and the last amendment to the petition contained an allegation that the defendant's Denver grade contributed to plaintiffs' damages by holding the flood waters on the land for more than 12 hours, thus destroying the stand of alfalfa and blue grass growing thereon.

The defendant, by its answer, denied generally the allegations of the petition, and alleged that the rain storm which caused the flood waters and injured the plaintiffs' property was so severe and unprecedented as to amount to an act of God, and pleaded the statute of limitations as to the damages which were set forth in the last amendment relating to the construction of the Denver grade because that amendment related to a cause of action which accrued more than four years before the amendment was tendered.

The reply was in effect a general denial of the allegations of the answer.

A trial in the district court for Lancaster county resulted in a verdict and judgment for the defendant, and the plaintiffs have appealed, and contend, first, that the judgment is not sustained by the evidence.

It appears that the plaintiffs' land is situated in Salt creek valley, directly south and west of the city of Lincoln, and about one and one-fourth miles south of what is known as defendant's J street bridge. The evidence discloses that the greater part of the city of Lincoln lies east of Salt creek, which flows from south to north through Lancaster county, and which rises near the southwest corner of the county, about 23 miles from the city, at an elevation of 1,500 feet above sea level. The head of Middle creek is 4 miles west of Pleasant Dale, in Seward county, at an elevation of

1,500 feet. Oak creek heads at Brainard in Saunders county, at an elevation of 1,600 feet. The three streams converge in what is called the "Salt creek basin," at the west of the city of Lincoln where the elevation is only 1,140 feet above sea level. In the 11 miles above defendant's J street grade, Salt creek falls 70 feet, and Middle creek falls 20 feet in the last 3 miles of its course. Oak creek has a fall of 420 feet, 40 feet of which is in the last 5 miles before it enters Salt creek. A short distance below the mouth of Oak creek, Antelope creek, with a total fall of 300 feet in 9 miles, empties into Salt creek. Little Salt creek, with a total fall of 410 feet and a fall of 70 feet in the last 7 miles of its course, empties into Salt creek, and Stevens creek, also a stream of considerable size, joins Salt creek below the mouth of Antelope creek, while the fall of Salt creek north from the city of Lincoln is only about 8 feet in 12 miles of its course.

The testimony shows that on the 5th and 6th days of July, 1908, a heavy rain storm raged over the 681 square miles of area drained by the creeks above mentioned. This rainfall was unusual in its extent and intensity. At Palmyra, in Otoe county, southeast of Lincoln, 4.8 inches of rain fell in 24 hours. During the same period of time, at Crete, 2.81 inches of rain fell. On the campus at the University, in the city of Lincoln, 5.3 inches of rain fell. At Woodlawn, on Oak creek, 5 miles from Lincoln, on the morning of July 6, the six-inch rain gage was found to be running over. Eight miles west of Lincoln, on Middle creek, 8 inches of rain fell during this storm. When the rain began falling the ground was already saturated with water, and witnesses testified that just north of the mouth of Antelope creek the high water, at daylight on the morning of July 6, was backing up from the north, and so continued for some time. This condition existed about two miles north of defendant's embankment and grades. Several witnesses testified, in substance, that at 6 o'clock on the morning of July 6 the water south of the J street grade

was near the top of that grade; that it went over the grade at about 8:30 o'clock, and in 15 or 20 minutes it filled up the basin north of the grade, and from that time the water was all over the tracks both north and south, and was over the J street grade; that in the morning when they first noticed the water it was higher on the south side of the track than it was on the north side, but at 2 o'clock in the afternoon it was nearly the same height on both sides of the grade, and was from 9 to 12 feet deep; that when the water was at its highest point it was as high on the north side as it was on the south side. It appears that the water commenced to recede about the middle of the afternoon of July 6; that it first ran to the north until about 10 o'clock in the forenoon, when the current ran back to the south; that about 5 o'clock in the afternoon it again ran to the north; that when the water was highest it was all over Middle creek valley and extended up that creek as far as one could see.

Defendant's engineers testified that the outlet of the Salt creek basin northeast of the city near Havelock was insufficient in size and extent to carry off the flood waters. Their testimony was corroborated by the topographical maps which were introduced in evidence, on which were shown the high water marks of the flood in question.

Mr. J. R. Hickox, a civil engineer, a graduate of Yale college, after describing the different elevations and the extent of the flood, testified that it would take about 76 hours for the flood water to flow out of the Salt creek basin, as the outlet near Havelock had a capacity to discharge only about 18,000 cubic feet of water per second.

As we view the record, there was sufficient evidence from which the jury could reasonably find that the extent of the flood in question was so great that the several improvements made by the defendant company in the Salt creek basin did not cause the water to remain upon plaintiffs' lands for more than 12 hours. The waters were caused to remain there by reason of the insufficiency of the outlet near Havelock.

Appellants assign error for the giving of instruction No. 1, in which the court stated that the defendant's improvements covered about 600 acres of land in the Salt creek basin. When these improvements are all taken into account, it is difficult to determine with any degree of certainty their full nature and extent, and it cannot be said that this instruction was so different from the facts which plaintiffs, by their evidence, attempted to describe as to amount to reversible error. The statement was merely an approximation and could not have influenced the jury to plaintiffs' prejudice. Again, the plaintiff tendered no instruction on that point and made no objection to the instruction when it was given.

Appellants also complain of instructions Nos. 8 and 9. The substance of these instructions was approved by this court in *Chicago, R. I. & P. R. Co. v. Shaw*, 63 Neb. 380, and *Conn v. Chicago, B. & Q. R. Co.*, 88 Neb. 732.

Appellants further complain of instruction No. 10, in which damages to personal property as well as to plaintiffs' real estate were mentioned. It appears that after the evidence was all taken, and just as the case was about to be submitted to the jury, plaintiffs dismissed the action so far as any claim for injury to personal property was concerned. Evidently this instruction was given because the jury had heard the evidence concerning the damages to personal property, and the giving of the instruction was not prejudicial error.

Complaint is made of instruction No. 11, for the reason that it does not contain the word "necessary" found in section 5944, Rev. St. 1913, which authorizes the railroad company to construct its line of watercourses. There is no claim that the construction complained of was not necessary. Therefore the plaintiffs could not have been prejudiced by leaving out the word "necessary," because that issue was not tried, and hence the omission of that word did not constitute error.

Instruction No. 13 is complained of because it is incomprehensible and argumentative and assumes a condition of

things not borne out by the evidence. It appears from the testimony of Mr. Loveland that the rain of July 6 and the previous day was greater by almost 100 per cent. than any rain covering the above described drainage area since the year 1887.

Other instructions complained of seem to be warranted by the evidence, and it was not error for the court to give them.

Finally, it is contended that the court erred in his instructions on the question of the statute of limitations. In the original petition plaintiffs did not claim any damage on account of the embankment known as the "Denver grade." That question was brought into the controversy, as above stated, by a rider, or amendment, to the petition, which was filed on the 4th day of November, 1913, and during the trial of the case. It brought into the case a new and different cause of action. Therefore the defendant pleaded the statute as against plaintiffs' Denver grade theory. That defense was good because more than five years had elapsed since the damage and before the filing of the amendment. *Westover v. Hoover*, 94 Neb. 596.

In conclusion, this court has twice decided on evidence substantially the same as that found in the record in this case that the defendant was not liable in damages for the flood of 1908. *Albers v. Chicago, B. & Q. R. Co.*, 95 Neb. 506; *Alt v. Chicago, B. & Q. R. Co.*, 96 Neb. 714. It seems clear that the extent of the flood of July 5 and 6, 1908, by which the plaintiffs were damaged, occurred from natural causes, and not by reason of the construction of defendant's bridges, embankments or grades.

Finding no reversible error in the record, the judgment of the district court is

AFFIRMED.

SEDGWICK, J. I think that some of the instructions were erroneous.

LEONARD E. BRITT, APPELLEE, v. OMAHA CONCRETE STONE
COMPANY, APPELLANT.

FILED FEBRUARY 5, 1916. No. 18601.

1. **Municipal Corporations: OBSTRUCTIONS IN STREETS: ACTIONABLE NEGLIGENCE.** It is actionable negligence to deposit a pile of sand and crushed stone on a paved street of a city and allow it to remain there over night without guarding it with a red light danger signal.
2. **Appeal: CONFLICTING EVIDENCE.** Where the question as to whether such an obstruction was guarded has been submitted to a jury upon conflicting evidence, the verdict will not be set aside by a reviewing court.
3. **Evidence: SUFFICIENCY: PHYSICAL FACTS.** Where a person has been injured in a collision with such an obstruction and it is claimed that the physical facts related by plaintiff's witnesses destroy their direct and positive evidence, which tends to show that the party injured was not guilty of contributory negligence, the physical facts must be so conclusive as to leave no question for the jury and require the court to direct a verdict for the defendant. If, however, the evidence is such as to present a question for the jury, their verdict will be sustained.
4. **Instructions** given by the court on his own motion examined and found to contain no reversible error; and the instructions requested by the defendant are held to have been properly refused.

APPEAL from the district court for Douglas county:
ABRAHAM L. SUTTON, JUDGE. *Affirmed.*

Alvin F. Johnson, for appellant.

W. W. Slabaugh and *C. W. De Lamatre*, contra.

BARNES, J.

This was an action brought in the district court for Douglas county for damages which the plaintiff alleged he had sustained by a collision of an automobile, in which he was riding, with a pile of sand and crushed stone which had been deposited by defendant, the Omaha Concrete Stone Company, on Thirtieth street, in the city of Omaha,

in front of a residence near Binney street. The owner of the residence was joined as a party defendant with the stone company, but the action was dismissed as to him before the trial was concluded. The plaintiff had the verdict and judgment, and the defendant has appealed.

The facts as shown by the evidence are, in substance, as follows: The plaintiff is a colored man, and a physician. On the evening of the 14th day of November, 1912, he had given a dinner party to one Guy Overall, who was about to leave that city. After the dinner was over, and at about midnight, plaintiff, together with Overall and his mother, and with one Adams, all colored people, started on an automobile ride about the city. Adams was the owner of the car and was also the driver. The party started from plaintiff's home and went west on Lake street to Thirtieth street, and thence north on that street about 1,800 feet to near the corner of Binney street, where they ran into the pile of sand and stone which had been left on the street by the defendant stone company on the previous evening at about 6:00 o'clock. The collision resulted in certain injuries, for which plaintiff obtained the judgment, and from which this appeal is prosecuted.

The defendant contends that the judgment is not sustained by sufficient evidence. The record discloses that when the car left Lake street it was allowed by the driver to coast down Thirtieth street to the place where it struck the stone pile. The driver of the car testified that as he was running the machine down the east side of Thirtieth street he saw two coal wagons standing on the street some distance ahead and turned out for them onto the street car tracks; that he, immediately after passing the coal wagons, turned back to the east side of the street; that he struck the pile of stone just north of Binney street; that as the car coasted down Thirtieth street it increased its speed and was running about 12 miles an hour when it struck the stone pile; that there was no light on the pile; that there was an arc light at Binney street; which was behind the car when the collision occurred; that the lights on the car were burn-

ing; that he did not see the stone pile until the car struck it. The plaintiff testified that he cautioned Adams as they coasted down Thirtieth street; that he looked behind to see that the car was not overtaken by the street car, and he thought the car was going about 12 miles an hour when it struck the stone pile; that he was looking ahead, but could not see the stone pile until the car was within five or six feet of it, and at that instant it was too late to stop the car; that when he saw the obstruction it looked like a shadow, looked grayish like a reflection from the arc light. Adams testified that he passed along Thirtieth street as late as 5 or 6 o'clock on the evening before the accident; that the street was practically clear at that time, and he had no reason to expect to meet any obstruction at that point. He also testified that there was no light burning on the stone pile when the accident occurred.

Appellant alleges that the trial court erred in receiving in evidence the ordinance of the city of Omaha in regard to depositing building material on the streets. This evidence was proper as tending to establish negligence on the part of the defendant. In this connection it should be further said that the court properly instructed the jury that the ordinance did not of itself establish negligence, but the jury were told that it might be considered in determining whether or not defendant was guilty of negligence under all of the facts as shown by the evidence.

Some of defendant's witnesses testified that they saw a red light on the stone pile early in the evening, while others claimed that they saw no light whatever. On that question the jury found for the plaintiff on conflicting evidence, and that finding should stand as establishing the fact of negligence on the part of defendant.

It is further contended that plaintiff was guilty of such contributory negligence as prevents any recovery in his favor in this case. The plaintiff testified that shortly before the car struck the stone pile he warned the driver to be careful, and that he looked behind the car to see that the street car did not overtake them. This testimony was

not contradicted by any one, and tends to show want of contributory negligence on the part of the plaintiff, as well as to refute the defendant's contention that the negligence of the driver should be imputed to the plaintiff. The jury determined both of those questions, and their verdict should be sustained.

It appears that no one but those riding in the auto saw the accident. None of the defendant's witnesses could testify as to the speed at which the car was going when it struck the stone pile, but the defendant strenuously contends that the physical facts shown by the testimony of plaintiff's witnesses are such as to discredit their statements as to the speed of the car, and show that it must have been going at the rate of 30 or 35 miles an hour when the accident occurred. On that question it may be said that just what the effect of such a collision would be is extremely problematical. There was testimony that when the car struck the stone pile the shock threw the plaintiff out of the car and about 15 feet, where he struck on the pavement and was severely injured. There was testimony on the part of other witnesses, however, which contradicted this statement and tends to show that the distance was not so great. Mrs. Overall, who was a large woman, was thrown some distance, and Guy Overall was also thrown out of the car, but was unhurt. The driver, who had hold of the steering wheel, remained in the car, but jumped out as soon as he could. The car ran on over the obstruction and about 100 feet onto a vacant lot before it stopped. We are unable to determine the speed of the car from these facts, and upon that point the evidence is conflicting. The rate of speed at which the car was going is not shown to be so great as to necessarily determine the question of contributory negligence, and we should not reverse the judgment of the trial court on a mere conjecture.

Defendant contends that the court erred in giving instructions numbered 7, 8, 9 and 11, on his own motion.

We have examined all of those instructions and find none of them contains reversible error.

It is further contended that the court erred in refusing to give each of ten instructions requested by defendant. From an examination of the record it appears that those requests were properly refused, for the court had on his own motion instructed the jury on all of the questions presented at the trial.

The controlling question in this case appears to be whether the plaintiff was guilty of contributory negligence at the time the car in which he was riding struck the stone pile. The attention of the jury was directed to that question by two separate instructions. In one of them it was said: "You are instructed in considering the evidence bearing on the question of the contributory negligence of the plaintiff just before and at the time of the accident it would be proper for you to take into consideration the entire situation and surroundings as existed at that time, including the rate of speed of the car, and if you believe from the evidence and under the instructions of the court, taking into consideration the entire situation, that plaintiff exercised ordinary and reasonable care for his own safety, then you are instructed plaintiff would not be guilty of contributory negligence. But, on the other hand, if you believe that the plaintiff failed to exercise ordinary and reasonable care for his own safety under the situation as existed just before and at the time of the accident, then you are instructed that plaintiff cannot recover."

By instruction No. 10 the court directed the attention of the jury to the street lights, and told them that if the street or arc lights lighted up the stone pile and its immediate vicinity so that it could have been seen by plaintiff in time to have avoided the accident without the aid or assistance of other artificial lights, then, as a matter of law, the defendant would not be guilty of negligence in failing to place a danger signal upon the stone pile or in failing to comply with the city ordinance. If the instruction was

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erroneous, it was prejudicial to plaintiff and not to defendant.

We have not discussed all of the defendant's 23 assignments of error, but they have all been carefully considered, and, viewing the whole record, we are unable to say that it contains any reversible error.

The judgment of the district court is therefore

AFFIRMED.

LETTON, J., not sitting.

KEYA PAHA COUNTY, APPELLEE, v. BROWN COUNTY,
APPELLANT.

FILED FEBRUARY 5, 1916. No. 18877.

1. **Counties: REPAIR OF BRIDGES: SUIT FOR CONTRIBUTION: SUFFICIENCY OF PETITION.** In a suit by a county to recover from an adjoining county one-half of the cost of repairing a bridge over a river dividing the two counties, a petition which describes the bridge, and alleges that it has been damaged and is in need of repair, that a portion of the bridge has been entirely washed away and destroyed, is sufficient to resist a general demurrer.
2. ———: ———: ———: **NOTICE.** "For the purpose of requiring a county to contribute to the expense incurred by an adjoining county in repairing a bridge over a river between them, a previous notice that it would be necessary to rebuild a portion which had been entirely washed away is sufficient to include an approach or abutment and any grading or riprapping essential to the proper construction thereof." *Brown County v. Keya Paha County*, 88 Neb. 117.
3. **Evidence examined and found sufficient to sustain the judgment.**

APPEAL from the district court for Brown county: R. R. DICKSON, JUDGE. *Affirmed.*

John M. Cotton, William M. Ely and J. S. Davisson, for appellant.

Forrest Lear and C. E. Lear, contra.

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BARNES, J.

This was an action by which Keya Paha county sought to recover from Brown county one-half of the cost of repairing and rebuilding a bridge over the Niobrara river between the counties above named. The defendant demurred to plaintiff's petition. The demurrer was overruled, and defendant filed an answer in which it was alleged that the bridge in question consisted of two spans, or two separate bridges; that one of the bridges was entirely washed away and destroyed, and that the work of restoring it was new construction, and was in fact the building of a new bridge; that defendant was not liable for one-half of the cost thereof because the notice served on the county commissioners of the defendant county provided for repairing the bridge. It was also alleged that the bridge was on a county line road between Rock county and the defendant county, and therefore there was a misjoinder of parties defendant. The allegations of fact, as stated in the petition, were admitted and the answer concluded with a prayer that the action be abated and dismissed, but, if it was not dismissed, judgment should not be rendered for more than one-fourth of the amount paid by the plaintiff for the repair of the bridge. The allegations of the answer were denied by a reply in which it was alleged that the bridge in question was originally constructed by subscriptions taken in Brown county; that the part of the bridge repaired by plaintiff had been twice destroyed and was repaired by Brown county; that plaintiff had been required to pay one-half of the cost of such repairs; that the bridge was not on the county line between Rock and Brown counties; that Rock county had never been called upon to contribute to the payment of the original construction of the bridge or of any of the repairs above mentioned. On the issues thus joined a trial was had to the court without the intervention of a jury. The evidence consisted of a stipulation of facts and certain exhibits, which were used as the bill of exceptions. The trial court found for the plaintiff and rendered a judgment against the de-

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fendant for the amount prayed for in the petition. The defendant has appealed.

The record discloses that the bridge in question is situated some distance west of the county line between Rock and Brown counties; that it crosses the Niobrara river between the plaintiff county and Brown county. It appears that the road leading from the bridge, a distance of about three-fourths of a mile to the top of the hill south-east of the river, strikes the county line between Rock and Brown counties at that point; that there is a branch of the road which leads to Bassett, in Rock county, but the main road leads to Long Pine, in Brown county. The record shows that there is no road on the section line between Rock and Brown counties which extends north into and through Keya Paha county; that the road between Rock and Brown counties is not a regularly laid out or established highway; that the road above described as leading from the bridge to the top of the hill was laid out and established by the defendant county. It also appears that the bridge in question consists of two spans over the two channels of the Niobrara river, which is divided at that point by a small artificial or made island; that the two spans above mentioned have always been used and considered as one bridge, and that one of the spans would be useless without the other; that one of the spans of the bridge was washed away and totally destroyed by the flood waters of the river, and that the other span was damaged and needed repair. The record also shows that the bridge has been twice repaired by Brown county, and that plaintiff has paid one-half of the costs of such repairs. We have not set out all of the stipulations, but only so much thereof as is necessary to a decision of this controversy.

The appellant contends that the trial court erred in overruling its demurrer to plaintiff's petition. An examination of the record convinces us that this contention is not well founded.

It is further contended that the judgment is contrary to law and is not sustained by the evidence. Section 2988,

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Rev. St. 1913, provides: "Bridges over streams which divide counties, and bridges over streams on roads on county lines, shall be built and repaired at the equal expense of such counties: *Provided*, for the building and maintaining of bridges over streams near county lines, in which both are equally interested, the expense of building and maintaining any such bridges shall be borne equally by both counties." This section of the statutes was construed in *Dodge County v. Saunders County*, 70 Neb. 442, and *Brown County v. Keya Paha County*, 88 Neb. 117. The opinions in those cases resolve all of the questions presented in the case at bar against the defendant's contentions.

The evidence sustains the findings of the district court, and the judgment is

AFFIRMED.

JENKINS LAND & LIVE STOCK COMPANY ET AL., APPELLANTS,
v. SAMUEL E. KIMSEY ET AL., APPELLEES.

FILED FEBRUARY 5, 1916. No. 19283.

1. **Mortgages: FORECLOSURE: DECREE: DORMANCY.** A decree of foreclosure of a mortgage in this state is not a judgment within the meaning of section 8056, Rev. St. 1913. *St. Paul Harvester Works v. Huckfeldt*, 96 Neb. 552.
2. ———: ———: **LIMITATIONS: ORDER OF SALE.** A decree of foreclosure may be enforced without an order of sale, and the lien thereof is not lost by a failure to procure the issuance of such an order within five years from the date of the decree.

APPEAL from the district court for Dundy county:
ERNEST B. PERRY, JUDGE. *Affirmed.*

J. H. Broady and Charles T. Jenkins, for appellants.

C. E. Eldred and Meeker & Hines, contra.

BARNES, J.

This was an action to restrain the sale of certain real estate under a decree of foreclosure, on the ground that the decree was rendered more than five years next before the order of sale was issued, and to quiet plaintiffs' title. The trial court sustained a demurrer to the petition. The plaintiffs elected to stand upon their pleading and their action was dismissed. They have brought the case to this court by appeal.

The only question presented by the record is whether a decree of foreclosure is within the provisions of sections 8056 and 8088, Rev. St. 1913, relating to dormant judgments, and providing when a judgment shall cease to be a lien on real estate. It is hardly necessary to set forth the sections above mentioned for their provisions are well known.

Plaintiffs contend that the decisions of this court in *Herbage v. Ferree*, 65 Neb. 451, *Medland v. Van Etten*, 75 Neb. 794, and *St. Paul Harvester Works v. Huckfeldt*, 96 Neb. 552, are unsound and should be overruled and a contrary rule should be established. Those decisions are based on *Beaumont v. Herrick*, 24 Ohio St. 445, and *Moore v. Ogden*, 35 Ohio St. 430. We have re-examined those cases and are convinced that they contain a correct statement of the law. It is there held that a decree finding the amount due on a mortgage, and ordering the sale of the real estate described therein, is not a judgment within the meaning of section 422 of the Ohio Code, which provides when a judgment shall become dormant. The Code of Ohio relating to the foreclosure of mortgages is practically the same as our own. Our Code provides that the action shall be commenced in the district court; that the petition must allege that no proceedings at law have been had, or commenced, to recover the mortgage debt; that the court shall find the amount due on the mortgage, and order the mortgaged premises sold for the satisfaction of that amount, with interest and costs. No judgment can be rendered by the court until after a confirmation of the sale,

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when the court may render a judgment for a deficiency, if any exists. The action is still pending and no final judgment can be rendered until the sale is confirmed, when, if there be a deficiency, a personal judgment may be rendered therefor upon which an execution may be issued. *Parmelee v. Schroeder*, 59 Neb. 553; *Alling v. Nelson*, 55 Neb. 161. In *Jarrett v. Hoover*, 54 Neb. 65, it was said: "A decree of foreclosure may be executed without order of sale. If one be issued, it cannot limit the power conferred by the decree."

Counsel for plaintiffs cite a Kansas case and one from Michigan in support of their contention that a decree of foreclosure is embraced in the provisions of the statute above mentioned. It appears from examination of the Kansas statutes that in that state a final judgment is rendered against the mortgagor in the first instance, and the mortgaged premises are sold under a special execution issued for that purpose. No provision is found in the statutes for the entry of a deficiency judgment. In Michigan a mortgage containing a power of sale is foreclosed by the publication of a notice for that purpose. Therefore the decisions of those states do not support the plaintiffs' contention. We are of opinion that our former decisions are right, and should be adhered to.

The judgment of the district court is

AFFIRMED.

MARGUERITE PHAIR ET AL., APPELLEES, V. SAMUEL G.
DUMOND ET AL., APPELLANTS.

FILED FEBRUARY 5, 1916. No. 18580.

1. **Intoxicating Liquors: ACTION FOR LOSS OF SUPPORT: PARTIES.** An action for loss of means of support caused by the death of a person in consequence of, or as the result of, traffic in intoxicating liquors, may be maintained by the children of the deceased, under the liquor laws of the state. *Roose v. Perkins*, 9 Neb. 304.

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2. ———: ———: DEFENSE. Where whiskey sold or given by a saloon-keeper contributes to a resulting intoxication, it is immaterial in what manner or from whom the drinker obtained the other liquor which helped to cause the condition.
3. ———: ———: LIABILITY ON BOND: RIGHTS OF CHILD. During incapacity caused by habitual drunkenness of her husband, a wife supported her minor children by her own labor. She afterwards died as the result of an assault committed upon her by the husband while drunk. *Held*, that a child born after the assault may, after the death of the mother, recover for loss of means of support upon the bond of a liquor dealer who contributed to the intoxication of the husband at the time he committed the assault.

APPEAL from the district court for Valley county: JAMES R. HANNA, JUDGE. *Affirmed*.

T. J. Doyle and Claude A. Davis, for appellants.

E. P. Clements and A. Norman, contra.

LETTON, J.

This action was brought by the guardian of two minor children to recover damages caused by loss of their means of support alleged to have been caused by the sale of intoxicating liquor by defendant Dumond to Orval Phair, their father, on May 22, 1908. Dumond was a licensed saloon-keeper in the city of Ord at that time. The other defendant is the surety upon his bond.

Two causes of action are set forth in the petition. The first alleges that Phair was an habitual drunkard in May, 1908, and that during the license year from the 1st of May, 1908, to the 1st of May, 1909, defendant furnished and sold Phair liquor to such an extent that he became debauched and depraved, and incapable of supporting his family; that he was arrested many times for drunkenness, and was sentenced to a term in the penitentiary on account of an offense committed while in that condition, and that the plaintiffs will be deprived of their sustenance during the time he is confined. The second cause of action charges that on the 22d of May, 1908, Jennie Phair, the mother of the plaintiffs, was a strong, healthy woman, capable of earning \$500 a year; that on that day Dumond furnished

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intoxicating liquors to Phair, which caused him to become intoxicated, and that while intoxicated he assaulted her, threw her upon the ground, kicked her in the side, and so injured her that she died as a direct result of said injury; that by reason of the injury and death of their mother, who during Phair's incapacity on account of habitual drunkenness and imprisonment had worked for money and supported them, the plaintiffs were deprived of her care and support, and that they have no property or estate.

The evidence and verdict establish the following facts: Phair was married in Ord, in March, 1905. He was a moderate drinker before he was married, but afterwards he became addicted to the use of liquor to excess, had prior to the fall of 1907 become a confirmed and habitual drunkard, and had repeatedly been arrested and committed to jail for offenses committed while drunk. In September, 1907, with his family, he removed to Central City, Nebraska. In this town there were no saloons, and Phair refrained from drinking to excess, was a steady worker, and supported his family. Mrs. Sower, the mother of Mrs. Phair, who lived at Ord, was taken sick early in May, 1909, and Mrs. Phair came from Central City to take care of her. On the evening of May 22 Phair came to Ord. He went into the saloon of defendant, asked for and was given a drink of whiskey by Dumond, and bought and drank another glass. Dumond stepped out of the room, and while he was gone Phair stole the bottle from which he had been served, with some whiskey in it. Soon after he went to the house of Mrs. Sower, created a disturbance, and, upon his wife attempting to quiet him, he pulled her out of the house, assaulted her and kicked her in the side. Officers were called. When they reached the house Phair and Mrs. Phair had gone. Upon making a search they found Mrs. Phair lying upon the ground beyond a railroad embankment not far away; Phair having run away. Her dress was torn, and she appeared to have suffered a shock. She was assisted to her mother's house, and upon examination it was found that her side was bruised, swollen and

much discolored just above the hip. The doctor who attended her testified there were bruises all over her body that night when he was called. She was pregnant and suffered a miscarriage about a month afterward. After this miscarriage her side would swell at intervals of three to five weeks; she would suffer from dull pains in her head and would seem somewhat stupified. A discharge would then occur of blood and pus, and she would apparently recover until the recurrence of the same symptoms. She continued to live with her mother for over a year after the injury, when she went back to her husband and lived with him until August 20, 1910. At about this time Phair was arrested and sent to the penitentiary. On October 25, 1910, she gave birth to one of the plaintiffs, Clara E. Phair. After the birth of the child the trouble with her side recurred. On Sunday, May 9, 1911, she had a similar attack to those she formerly had, except that she had a severe chill. She gradually became unconscious, an eruption broke out over her body which was diagnosed as a septic inflammation, and she died upon the following Wednesday. Previous to the assault Mrs. Phair had been a strong, healthy, young woman, had borne one child and had never had a miscarriage. Several physicians testified that in their opinion her death was due to septic poisoning, proceeding from a pus cavity which resulted from the assault made by her husband; that the cavity would periodically fill with pus which would force a passage and close again. Other physicians testified that in their opinion if this condition existed it would be impossible for a woman to conceive and bear a healthy child as Mrs. Phair did. There is evidence enough to sustain a verdict based upon the proposition that the assault produced the septic conditions which caused her death.

More than 40 assignments of error are made, and many of the instructions given by the court are attacked. The law in cases of this nature has been repeatedly declared by this court and the charge of the court seems in the main to be in accordance with settled principles.

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One of the principal complaints made is that the second cause of action, which was based upon loss of support furnished by Mrs. Phair to her children, cannot be maintained after her death by the children, but can only be maintained by the administrator of Mrs. Phair in a separate action for her death. This precise question has been settled in this state against the appellant's contention. *Gran v. Houston*, 45 Neb. 813; *Fitzgerald v. Donohoe*, 48 Neb. 852; *Murphy v. Willow Springs Brewery Co.*, 81 Neb. 223.

Another complaint is that, since the guardian was given power to relinquish the care of the children to the Nebraska Children's Home Society by the county court and had relinquished their persons to such society, she was not competent to act in their behalf. The guardian had been regularly and legally appointed and has never been discharged. It is not shown that any adoption of the children had taken place or that any other guardian or caretaking agency had ever been appointed. The court will not presume that she will misappropriate any fund belonging to these children, and the mere relinquishment of their personal care does not deprive her of control over their estate. Furthermore, the action could be maintained by the plaintiff as next friend. The objection is merely to a matter of form and is not sustained.

It is strongly urged that, since the intoxication of Phair resulted from the drinking of whiskey in the stolen bottle, the defendant is not liable. The evidence shows that Dumond furnished two glasses of whiskey to Phair before the bottle was stolen. The whiskey sold and given contributed to the resulting intoxication. This is sufficient under the statute.

The argument that, because the system of Phair had become so weakened by drunkenness before May 22, 1908, he was worthless to his family, and that therefore recovery could not be had for failure to support his children thereafter, is unsound. Phair had for months before that day abstained from drinking to excess and had supported his family in Central City. He was set upon the old path by

the liquor furnished by Dumond and he never left it afterward. Instruction No. 6 told the jury that if they believed Phair was an habitual drunkard and failed to support his family before May 22, 1908, no compensation should be given for the want of earning capacity or squandering his earnings resulting from his condition as it was before that date. Instructions 18 and 19 protect defendant's interest in this behalf. The instructions fairly submit the questions presented by the pleadings and the evidence.

It is said that instruction No. 13, which told the jury that, if the whiskey sold by Dumond contributed to intoxicate Phair, it is not material how he obtained the liquor that completed the intoxication, "has no support in principle or precedent," and "is shocking to every true conception of right and wrong." By section 3862, Rev. St. 1913, it is provided that, in such an action as this, it is only necessary to prove that the defendant gave liquor to the person whose acts are complained of on the day when the acts were committed, and that, in an action by one whose support legally devolves upon a person disqualified by intemperance from earning the same, it shall only be necessary to prove that the defendant has given or sold liquor to such person during the period of disqualification. This court has consistently held from the first that each licensed vendor who contributes to the intoxication is liable. Granted that the stolen whiskey completed the intoxication, it is clear that the liquor drank in the saloon contributed to produce it. *Gorey v. Kelly*, 64 Neb. 605; *Kerkow v. Bauer*, 15 Neb. 150.

Summons was issued for defendant Dumond on February 27, 1912. There was no indorsement on this of any amount for which plaintiffs would take judgment if defendant failed to appear. An alias summons bearing such an indorsement was issued and served on November 14, 1912. It is argued that as to Dumond the action was barred by the statute of limitations before the latter summons was served. One of the plaintiffs was not *in esse* and the other was under disability when the cause of action

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accrued, and the guardian was not appointed until a short time before the suit was begun. Under section 7576, Rev. St. 1913, the action was not barred.

The evidence shows that Mrs. Phair supported her children by her own earnings up till the time of her death.

It is contended that, since Clara E. Phair was not born until October, 1910, while the sale of liquor was made in May, 1908, no action can be maintained by her or in her behalf. The statute (Rev. St. 1913, sec. 3859) provides: "The person so licensed shall pay all damages that the community or individual may sustain in consequence of such traffic, he shall support all paupers, widows, and orphans, and the expenses of all civil and criminal prosecutions growing out of, or justly attributed to, his traffic in intoxicating liquors."

In an action of this nature in Indiana it was held that a posthumous child could recover. *State v. Soale*, 36 Ind. App. 73. It was held in *Nelson v. Galveston, H. & S. A. R. Co.*, 78 Tex. 621, that a posthumous child was within a statute giving a right of recovery to "surviving children." In *Roach v. Wolff*, 96 Neb. 50, a child was held entitled to recover damages for the death of the father, even though the mother, suing for herself and another child, had already recovered on account of the same death. We think the provisions of our statute broad enough to include any child who has been deprived of its support in consequence of the traffic.

A number of other complaints are made; but, since we are of the opinion that the trial was fairly conducted and the verdict is supported by the evidence, the judgment of the district court is

AFFIRMED.

CLARENCE L. SHAFER, ADMINISTRATOR, APPELLANT, V.
BEATRICE STATE BANK, APPELLEE.

FILED FEBRUARY 5, 1916. No. 18326.

1. **Appeal in Equity: TRIAL DE NOVO.** Upon appeal in actions in equity, this court is required by the statute to try the issues *de novo*, without reference to findings of the trial court; but, when the testimony of witnesses orally examined before the court upon the vital issues in the case is conflicting, so that it would be impossible that both versions of the transaction can be true, this court will consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.
2. ———: **CONFLICTING EVIDENCE.** When witnesses, of apparently equal credibility, disagree in their testimony as to an important fact, circumstances in the evidence which tend to indicate which version of the transaction is reliable will be carefully considered.
3. ———: **SUFFICIENCY OF EVIDENCE.** The evidence in this case is considered to justify the findings of the trial court.

APPEAL from the district court for Gage county: LEANDER M. PEMBERTON, Judge. *Affirmed.*

Burkett, Wilson & Brown, for appellant.

Sackett & Brewster, contra.

SEDGWICK, J.

In April, 1912, Mary V. Shafer, with her daughter Lois Ripley, and O. A. Ripley, the husband of Lois, executed and delivered to the Beatrice State Bank a promissory note for \$1,100, payable one year after date. Afterwards Mary V. Shafer began this action in the district court for Gage county, and in April, 1913, Clarence L. Shafer filed an amended petition therein, as administrator of the estate of Mary V. Shafer, in which he alleged that Mary V. Shafer "departed this life * * * on the 24th day of November, 1912," and that thereafter he was duly appointed administrator of her estate. In his amended petition he asks "that

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the defendant, the Beatrice State Bank, be perpetually enjoined from selling, negotiating, indorsing or transferring the said note, and that the said note as to the said Mary V. Shafer and her estate be canceled, annulled and held for naught, and for such other, further and different relief as equity may require." It appears that O. A. Ripley had sold a note in the same amount to the bank, which bore the name of John Wignall as maker, and in which Mr. Ripley was payee. Mr. Wignall denied his signature to the note and refused to pay the same, and afterwards, as a witness in the case, testified that he never signed the note and did not know that the note had been executed to Mr. Ripley. The note executed by Mrs. Shafer was given in lieu of the Wignall note, and it was alleged that Mrs. Shafer's signature to this note was procured by duress by Mr. Harden, the vice-president of the bank, and that this note was given on an agreement to compound a felony and prevent a prosecution against Mr. Ripley for forging the Wignall note. The defendant admitted purchasing the Wignall note, and alleged that it was a forgery, admitted that the note now in question was taken by the bank in lieu of the Wignall note, and denied that this note was procured by duress or that there was any agreement to compound the felony. The court found generally in favor of the defendant, and the plaintiff has appealed.

It appears that a meeting was held by the various parties interested, at which the plaintiff Clarence L. Shafer, Mr. Ripley, and Mrs. Shafer, and two daughters of Mrs. Shafer, Mrs. Ripley and Mrs. Ella Doty, and Thomas Harden, the vice-president of the bank, were present. This plaintiff and Mrs. Doty testified directly and positively to language used by Mr. Harden and statements made by him which would strongly tend to prove the allegations of the petition. Mrs. Ripley testified that she was present during the whole transaction, and she as emphatically denied that any such language was used by Mr. Harden or any such statements made by him. Mr. Harden was called as a witness in behalf of the bank and was asked to testify in

regard to the transaction of the execution of the note. This was objected to under the statute on the ground that he had direct legal interest in the result of the suit and could not be allowed to testify to conversations and transactions between himself and the deceased maker of the note. This objection was sustained by the court, but his counsel was allowed to call the witness' attention to the statements of the plaintiff's witnesses as to language used by him, and he was allowed to categorically deny having made the representations and statements attributed to him by the plaintiff's witnesses. His evidence explicitly denies the most important testimony of the plaintiff's witnesses in that regard.

Upon appeal in actions in equity, this court is required by the statute to try the issues *de novo*, without reference to findings of the trial court; but, when the testimony of witnesses orally examined before the court upon the vital issues in the case is conflicting, so that it would be impossible that both versions of the transaction can be true, and it is apparent that the trial court relied upon the evidence of two witnesses rather than that of the two witnesses who oppose them, this court will consider the fact that the trial court had the opportunity of observing the witnesses, their manner of testifying, their probable knowledge and understanding of the facts that they testify to, their interest in the result of the suit, and other circumstances of that nature that might enable him to determine the truth of the matter. This is especially true when there are other circumstances in the case that tend to indicate which version of the transaction is reliable.

It appears that the evening before this note was given, Mrs. Shafer and Mr. Ripley and other members of the family had a conference in regard to the matter, and that at some time during negotiations it was arranged among the relatives that Mrs. Ripley should sign this new note with her husband, and that Mrs. Shafer should also sign it, and if Mr. and Mrs. Ripley were unable, or for any reason failed to pay the note, or any part of it, so that Mrs. Shafer

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was required to pay some part of it, the amount so paid by Mrs. Shafer should be deducted from that part of Mrs. Shafer's estate which would otherwise go to her daughter, Mrs. Ripley. It also appears that shortly before that time Mrs. Shafer had made a will whereby she devised and bequeathed to her daughter, Mrs. Ripley, an undivided one-seventh part of her estate, and that after the death of Mrs. Shafer it appears that her estate was of the value of at least \$15,000. At the time when this note in question was executed Mrs. Ripley and her husband, in pursuance of this understanding between the relatives, executed and delivered to Mrs. Shafer their promissory note in like amount, and also executed and delivered to her their written agreement, which provided that any amount that Mrs. Shafer might be compelled to pay on account of the note in question should be deducted from Mrs. Ripley's share of her mother's estate. This plaintiff, as administrator of Mrs. Shafer's estate, now holds the note which Mrs. Ripley and her husband executed to Mrs. Shafer, and if the estate is required to pay this note to the bank, or any part of it, there is nothing to indicate that he will be prevented from offsetting such payment against the interest of Mrs. Ripley in the estate under the will. It is not contended that the signature of Mrs. Ripley to the note in question was obtained by duress. These and other circumstances in the case tend strongly to indicate that Mrs. Shafer in signing this note relied upon this family arrangement rather than that she was compelled by duress.

The evidence offered tending to show an agreement to compound a felony is not clear and satisfactory. The petition alleged that the note which it is alleged was forged was delivered by Mr. Harden to Mr. Ripley, but the testimony of all the witnesses was that the note was turned over to Mrs. Shafer. The plaintiff and Mrs. Doty testified to some remarks of Mr. Harden during the negotiations to the effect that a prosecution for forgery would be an unfortunate thing, and similar remarks, but they do not testify to any agreement that such prosecution should be

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stified or prevented in any way, and their testimony as to these statements is denied by Mr. Harden, and also by Mrs. Ripley.

While the case is not free from doubt, it appears that the court tried the case with care, and under all the circumstances we do not feel justified in coming to a different conclusion.

The judgment of the district court is

AFFIRMED.

FAWCETT, J., not sitting.

JAMES PIERCE, APPELLEE, v. BOYER-VAN KURAN LUMBER &
COAL COMPANY, APPELLANT.

FILED FEBRUARY 5, 1916. No. 19447.

1. **Master and Servant: INJURY TO SERVANT: RIGHT TO COMPENSATION.** An employee is not entitled to compensation for injury under the employers' liability act unless the accident which caused the injury happened in the course of his employment, and arose out of his employment. Rev. St. 1913, sec. 3650.
 2. ———: ———: ———. An accident resulting from a risk reasonably incident to the employment should be considered as arising out of the employment.
 3. ———: ———: ———: **ASSAULT.** If an employee is assaulted by a fellow workman, whether in anger or in play, an injury so sustained does not arise "out of the employment," and the employee is not entitled to compensation therefor under the employer's liability act.
 4. ———: ———: **COMPENSATION.** The employers' liability act allows the parties interested to "settle all matters of compensation between themselves." Rev. St. 1913, sec. 3677. The amount of compensation, when not agreed upon by the parties, is to be determined by the district court (section 3680) and, except as expressly provided in the act, must be payable periodically (section 3666).
 5. ———: ———: **COMMUTATION OF COMPENSATION.** When the amount of compensation in periodical payments has been determined, either by agreement of the parties, or by the decision of the court, it "may be commuted to one or more lump sum payments, except
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compensation due for death and permanent disability." Rev. St. 1913, sec. 3681.

6. ———: ———: ———: ———: CONSENT OF COURT. In such case no other or different authority for making such commutation is provided by that section. It still depends upon the agreement of the parties, except that their right to so agree in the specified cases depends upon "the consent of the district court."
7. ———: ———: ———: ———. In general, the agreement of the parties will authorize such commutation of payments. In case of death or permanent disability, the consent of the court is also necessary. If the district court upon careful investigation finds that special circumstances exist making it necessary to commute to a lump sum for the protection of the workman or his dependents, the court may "consent" to such agreement by the parties.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Reversed.*

Mahoney & Kennedy, for appellant.

Dunham & Aye, contra.

SEDGWICK, J.

While the plaintiff was in the employ of the defendant, another employee of the defendant threw a small stick, which struck the plaintiff in the eye. The plaintiff brought this action in the district court for Douglas county to recover compensation under the employers' liability act. The trial court found in plaintiff's favor, and defendant has appealed.

The defendant presents two questions for consideration, and contends: First, that the findings of the court that the accident arose out of plaintiff's employment is not supported by the evidence; second, that the court erred in finding that the plaintiff is entitled to have his weekly compensation payments commuted to one lump sum payment, and the court erred in entering judgment for the plaintiff for a lump sum. These are important questions under this statute. Section 3650, Rev. St. 1913, provides: "If both employer and employee become subject to part II of this article, both shall be bound by the schedule of compensation herein provided, which compensation shall be

paid in every case of injury or death caused by accident arising out of and in the course of employment, except accidents caused by, or resulting in any degree from wilful negligence, as hereinafter defined, of the employee." It is clear that the meaning is that the employee shall not be entitled to compensation under the act unless the accident which caused his injury happened in the course of his employment. The facts conceded by the parties are that the plaintiff was regularly in the employment of the defendant. He was acting as a teamster, and at the time of the accident complained of was returning with his team and wagon to the yards of the defendant, and as he was entering the yards another employee, Brown, jumped into the wagon and began a playful scuffling with the plaintiff. Brown soon left the wagon, and, after running a short distance, picked up a small stick, which he playfully threw at the plaintiff, and which struck the plaintiff in the eye, causing the loss of his eye. The contention is that the plaintiff scuffled with Brown while he was upon the wagon, and that after Brown left the wagon the plaintiff attempted to strike him with one of the lines. This latter contention is alleged in the answer, as follows: "Such injury as the plaintiff has was received through a playful assault or friendly scuffle which plaintiff provoked and brought upon himself by attempting to strike said Guy Brown with the end of one of the lines with which the plaintiff was driving his team, and the action of said Guy Brown in throwing the stick which injured the plaintiff was incited and caused by plaintiff's own action." The plaintiff in his testimony denied that he engaged voluntarily in any scuffle with Brown, and denied that he struck Brown with the line or made any attempt or motion toward doing so. Brown testified to something of a scuffle upon the wagon, and also testified positively that the plaintiff attempted to strike him with the line after he left the wagon, which was the cause of his throwing the stick. There was some other evidence upon these two points, but it may be said to be substantially conflicting.

"The accident must 'arise out of' the employment, as well as 'in the course of' the employment. Thus, where a workman during the course of the employment does something entirely foreign to the work which he is employed to do (playing a practical joke, for example) whereby he is injured, this accident could be said to have occurred 'during the course of' the employment, but it could not be said to 'arise out of' the employment, because the workman was not doing anything which he was employed to do when the accident happened." 1 Bradbury, Workmen's Compensation, p. 398.

The parties cite other authorities in the briefs establishing this rule. In this case clearly the plaintiff was not doing "something entirely foreign to the work which he is employed to do." He did not leave his wagon; the team was not stopped; he continued his regular employment. If he resisted the advances of Brown and attempted to force him from the wagon, there is no evidence whatever that plaintiff did anything to encourage Brown to continue his performances. There is no doubt, under the many authorities cited by both parties, that if the workman abandons his employment, even for a short time, and engages in play, or some occupation entirely foreign to his employment, he is not entitled to compensation for an accident by which he is injured while so doing. It would seem also to be clear that, even if he does not abandon his employment, and even while engaged in the performance of his duty, if he does some act or thing not connected with his employment, which was intended to and probably did provoke an assault or retaliation, he would not be entitled to compensation for an injury the result of an accident so caused by himself. It is difficult to determine from this evidence whether the plaintiff made any motion at or toward striking Brown with his lines, and if he did it was in direct connection with Brown's interference with him, and may reasonably be said to be a part of that transaction.

There is evidence in the record that the defendant's employees were accustomed to join in what they called

horse-play, and that the defendant took no precautions to stop such a custom or protect his employees. There is also evidence that this plaintiff was not in the habit of joining in such playful performances. Under such circumstances the supreme court of New Jersey said: "Where the accident is the result of a risk reasonably incident to the employment, it is an accident arising out of the employment (citing cases). The trial judge found, as a fact, that the decedent did nothing to invite the attack, and it is not denied that the decedent was acting, at the time, within the scope of his employment. * * * In the case under consideration, it appears that the prosecutor employed young men and boys. It is but natural to expect them to deport themselves as young men and boys, replete with the activities of life and health. For workmen of that age, or even of maturer years, to indulge in a moment's diversion from work to joke with or play a prank upon a fellow workman is a matter of common knowledge to every one who employs labor. At any rate, it cannot be said that the attack made upon the decedent was so disconnected from the decedent's employment as to take it out of the class of risks reasonably incident to the employment of labor." *Hulley v. Moosbrugger*, 87 N. J. Law, 103.

Such rule would perhaps not be unjust in its general application. The question is whether our statute can be so construed. The language of the statute is identical with the earlier statute of England, which was adopted also by some of our states. It had been many times construed by the English courts before it was adopted by our legislature. Under such circumstances, the courts always consider that, if the legislature was not satisfied with the construction which had been given to language adopted from another jurisdiction, the language adopted would have been so guarded in the statute adopting it as to make the intention of the legislature clear. In other words, as it is generally stated, when a statute of another jurisdiction is adopted, its known construction and meaning in the jurisdiction of its origin is adopted also, unless a contrary intention is

expressed by the legislature adopting it. The case of *Hulley v. Moosbrugger*, upon appeal to the court of errors and appeals (95 Atl. (N. J.) 1007), was reversed, and the law stated to be: "An employer is not charged with the duty to see that none of his employees assaults any other one of them, either wilfully or sportively. An employer is not liable, under the workmen's compensation act (P. L. 1911, p. 134), to make compensation for injury to an employee which was the result of horse-play or skylarking, so called, whether the injured or deceased party instigated the occurrence or took no part in it; for, while an accident, happening in such circumstances, may arise in the course of, it cannot be said to arise out of, the employment." The court cited and quoted from many decisions of the English courts which had so construed the statute long before our legislature adopted it, and we must conclude that our legislature intended that it should be so construed.

Did the court err in entering judgment for the plaintiff in a "lump sum"? The following sections of the Revised Statutes of 1913 appear to bear upon this question:

"Except as hereinafter provided, all amounts of compensation payable under the provisions of this article shall be payable periodically in accordance with the methods of payment of the wages of the employee at the time of his injury or death." Section 3666.

"The interested parties shall have the right to settle all matters of compensation between themselves in accordance with the provisions of this article." Section 3677.

"The amounts of compensation payable periodically under the law, either by agreement of the parties, or by decision of the court, may be commuted to one or more lump sum payments, except compensation due for death and permanent disability. These may be commuted only with the consent of the district court." Section 3681.

This court had occasion to consider one phase of this question in the recent case of *Bailey v. United States Fidelity & Guaranty Co.*, ante, p. 109. In that case the employer and the workman had agreed upon such commutation and

the trial court rendered judgment in a lump sum. The question was whether the court had power to do so without the consent of the insurance company, which was also a party to the suit and was objecting to such commutation. This court sustained the trial court in so holding. It may no doubt sometimes happen that the workman, or his dependents, will be placed at a disadvantage by the refusal of the employer to agree to commutation in a lump sum. He may be compelled to receive a much less amount than he is entitled to because of his necessity to have the same paid in a lump sum. In the recent case above cited, the court construed the statute and held that the statute implies "that a previous agreement must have been reached which will be ratified by the district court, and that without such an agreement the court cannot compel such a commutation of payments. * * * We do not feel at liberty to transpose the language of this section, as plaintiff desires, and change its meaning so as to make commutation compulsory. The meaning is not ambiguous. The fact that the legislature did not express such a thought, while many such statutes do, is significant." The law provides that "interested parties shall have the right to settle all matters of compensation between themselves." Section 3677. Section 3681, which provides that periodical payments may be commuted, is in harmony with this provision. It does not provide that the district court may order commutation at the request of one of the parties, but does provide that the parties themselves cannot agree upon a commutation in certain cases without the consent of the court. If there is doubt in regard to the justice of this provision, there seems to be nothing in the language of the statute that would justify the court in construing it differently, and the remedy, if one is needed, must be by the legislature. It does not appear that the parties had agreed upon commutation, and the court has no authority to order it without such agreement.

The judgment of the district court is reversed and the cause remanded.

REVERSED.

FRED JOHANSEN, APPELLEE, v. UNION STOCK YARDS COMPANY, APPELLANT.

FILED FEBRUARY 5, 1916. No. 19457.

1. **Employers' Liability Act: "ACCIDENT," "INJURY."** The employers' liability act defines the words "accident" and "injury" as used in that statute, and distinguishes between them. An accident produces "objective symptoms of an injury," and an injury includes violence to the physical structure of the body and the natural results therefrom. Rev. St. 1913, sec. 3693b.
2. **Master and Servant: INJURY TO SERVANT: EMPLOYERS' LIABILITY ACT: WHEN INJURY OCCURS.** When an accident to an eye, which at first appears not serious, results, after a week or more, in a diseased condition of the eye which destroys the sight, the "injury occurred," within the meaning of the statute, when the diseased condition culminated.
3. ———: ———: ———: **JUDGMENT.** The district court cannot enter judgment for a "lump sum" under the employers' liability act without the agreement of the parties.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Reversed, with directions.*

Mahoney & Kennedy and *Guy C. Kiddoo*, for appellant.

Murphy & Winter, contra.

SEDGWICK, J.

While the plaintiff was employed by defendant, he was injured by an accident which caused the loss of an eye. He brought this action in the district court for Douglas county under the employers' liability act, and obtained a judgment, from which the defendant has appealed.

The defendant presents two principal questions for our consideration: First. Has there been a substantial com-

pliance with section 3674 of the Revised Statutes, which provides: "No proceedings for compensation for an injury under this article shall be maintained, unless a notice of the injury shall have been given to the employer as soon as practicable after the happening thereof; and unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same." Second. Can the district court enter a judgment for a lump sum without an agreement of the parties to that effect?

The plaintiff alleged in his petition that on the 18th day of December, 1914, he "was engaged as one of the men in putting the roofing on the hog-house, one of the buildings being erected and constructed by the said company, and while so engaged, and while preparing a tar mixture and composition used in the construction of said roofing, by reason of the splashing of the hot tar mixture, a portion of which struck plaintiff in the left eye," he lost the eye. He also alleged that the defendant company, in charge of the plant "in which plaintiff was working, knew of the injury and talked to the plaintiff about it, advising this plaintiff to go and consult a physician with reference to said injury," and that the plaintiff lost the sight of his eye, "which loss of sight occurred on or about June 1, 1915," and that "within six months after the occurrence of said injury the plaintiff herein made claim to defendant company for his compensation, as by law required." This notification was in a letter written to the defendant by plaintiff's attorney and is conceded to be sufficient in form, but the defendant alleges that the notice was dated June 19, 1915, and was not within six months after the injury. It is conceded that the accident happened more than six months before this claim was made. The trial court found "that said accident resulted in a total disability to plaintiff on December 25, 1915."

The statute defines the word "accident" and the word "injury" as used in the act and distinguishes between them.

"The word 'accident' as used in this article shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen event, happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. The terms 'injury' and 'personal injuries' shall mean only violence to the physical structure of the body and such disease or infection as naturally results therefrom." Rev. St. 1913, sec. 3693b.

The evidence was without contradiction that the employees who were working with the plaintiff at the time treated the boiling over of the tar and its effects upon those working over it in the nature of a joke, not realizing that any one had been seriously injured. The plaintiff himself was not aware of the effects that would "naturally result therefrom." The plaintiff went to his home the night after the accident, and he testified that, with the help of his niece, who was living with him, he washed his eye with warm water, and they appear to have so continued treating it, without realizing what might result from the accident, for several days, until about the 25th day of December, when he was induced to consult a physician, who advised him to go to a hospital and consult an expert. This he accordingly did, and was informed that his eye was in a serious condition and might result very unfavorably. During this time apparently, from this evidence, the injury resulting from the accident gradually became developed, and it cannot be said that the injury resulted from the accident, within the meaning of the statute, before the time it was discovered that it might become permanent, which was some time after the 25th of December. This evidence clearly justifies the finding of the trial court, under this statute, that the accident resulted in a total disability to plaintiff on December 25, 1915. It also appears from the evidence that the plaintiff's foreman knew of the accident at the time, or very soon after it occurred. He so testifies himself. He could not, of course, then have known of the injury as it finally developed.

The defendant quotes from a decision of the supreme court of Wisconsin in *City of Milwaukee v. Miller*, 154 Wis. 652, in which that court construes their statute, which provides that the employer shall furnish medical and surgical treatment, etc., "and in case of his neglect or refusal seasonably to do so, the employer to be liable for the reasonable expense incurred by or on behalf of the employee in providing the same." This statute is so unlike ours that its construction by that court can furnish us no precedent. It is, of course, necessary that our statute should be substantially complied with, which in this case we think has been done.

The remaining question discussed in the briefs was presented and determined in *Pierce v. Boyer-Van Kuran Lumber & Coal Co.*, ante, p. 321. For the reasons there given, we must hold that the trial court could not commute to a lump sum periodical payments found due under the statute, without an agreement to that effect by the parties.

The judgment of the district court is therefore reversed and the cause remanded, with instructions to enter a judgment for periodical payments as provided by the statute. The costs of this appeal will be taxed to the parties incurring the same.

REVERSED.

ALBERT E. EDHOLM, APPELLEE, v. KATHERINE R. J. EDHOLM,
APPELLANT.

FILED FEBRUARY 5, 1916. No. 18577.

1. **DIVORCE: APPEAL: REVIEW.** On appeal from a decree of divorce, the supreme court will examine the evidence, draw its own independent conclusions therefrom, and, if the evidence supports the findings of the district court, the decree will be affirmed.

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2. ———: ALIMONY. \$25,000, the alimony award to the defendant, together with \$50 a month for the support and education of the minor daughter of plaintiff and defendant, under all the conditions as shown by the record, is *held* to be reasonable and should not be either diminished or increased.

APPEAL from the district court for Douglas county:
ABRAHAM L. SUTTON, JUDGE. *Affirmed.*

Brome & Brome and William G. Stewart, for appellant.

Carl E. Herring and Jefferis & Tunison, contra.

HAMER, J.

This is an appeal from a judgment of the district court for Douglas county granting the plaintiff, Albert E. Edholm, a divorce from his wife, Katherine R. J. Edholm. The plaintiff charged defendant with extreme cruelty toward him, and prayed for a divorce and the custody of their minor child, Camilla. The defendant by her answer denied the allegations of cruelty alleged in plaintiff's petition, and by way of cross-petition charged plaintiff with extreme cruelty and prayed for a divorce. The reply was a general denial of the facts alleged in defendant's cross-petition. The trial court found for the plaintiff and against the defendant, and entered a decree for an absolute divorce in his favor, gave the defendant the custody of her minor daughter, and permanent alimony in the sum of \$25,000, with \$50 a month for the support of the minor child, and both parties have appealed, and both parties contend that the decree is not sustained by the evidence.

The record recites that the plaintiff was married to the defendant in Omaha, Douglas county, Nebraska, on the 17th day of November, 1900, and that he has since resided in Omaha, and is engaged in the jewelry business in said city, and has been so engaged for more than 23 years, and that he has maintained a jewelry store at 107 North Sixteenth street until January, 1905, when he removed the same to 323 South Sixteenth street, where he is still engaged in the business; that the issue of the marriage is

one child, Camilla, whose age was 12 years on the 19th of November, 1913; that the defendant has been guilty of extreme cruelty toward the plaintiff, consisting of angry words and exhibitions of ill temper, all without excuse or justification of any kind; that the defendant was accustomed to finding fault with the plaintiff, and had frequent outbursts of ungovernable rage and impatience; that she refused to be present in the plaintiff's store during the Christmas holidays, and expressed to the plaintiff in violent language her contempt and detestation of his business as a jeweler, and she criticised trades people in general and condemned them as unworthy of confidence and as belonging to a rank much lower than herself and her family, who associated only with doctors and lawyers and army officers; that she belittled the plaintiff's business and sought to make him abandon it, and ridiculed him for following such a business; that she found fault with the plaintiff concerning money matters, although the plaintiff was generous and kind to her in providing for her present wants, and even went so far as to pay the bills which she had contracted prior to her marriage with the plaintiff; that she continued to find fault with the plaintiff concerning money matters from the time of her marriage with him up to the day of filing the petition; that she charged the plaintiff with failing to provide her with spending money according to her station in life; that these complaints were all unjust, wrongful and cruel, and made without reason or justification; that she constantly found fault with the plaintiff and criticized and condemned him, and exercised her ill-governed temper upon him; that she took a special delight in finding fault with the plaintiff to his friends and acquaintances; that she would quarrel with the plaintiff in public and apparently to attract attention; that she would quarrel without cause with the carpenters and builders at work on plaintiff's proposed residence; that the defendant objected to plaintiff coming home to lunch; that plaintiff was ill much of the time and was afflicted with insomnia, which was greatly aggravated by the

defendant's misconduct; that defendant connived with certain employees in the store and tried to create discord and contention between plaintiff and his employees in his jewelry business, and thereby injured the plaintiff's business; that defendant charged the plaintiff without cause with sustaining improper relations with women employees in the store and also with other women; that she demanded of the plaintiff that he commit acts of infidelity with women; that the defendant would purchase and bring home vile and indecent books; that she was accustomed to use vile and indecent language; that while plaintiff was in ill health and suffering from insomnia the defendant persuaded him to embrace the faith of Christian Science, and that, when the plaintiff purchased and brought home books expressing a belief in Christian Science, she ridiculed that faith and wrote vile and indecent statements on the books and defaced and destroyed the same; that this was done to dishearten the plaintiff and destroy his peace of mind; that defendant would jerk the Christian Science books out of the plaintiff's hands and spit upon them and throw them on the floor.

The petition also sets up numerous acts of physical violence on the part of the defendant toward the plaintiff; that she threatened to kill the plaintiff, and locked him in the basement of the home; that she threw dishes at him when he was seated at the table; that she has thrown the contents of her plate at the plaintiff; that she pointed a loaded revolver at him and threatened to kill him, and on another occasion bit the plaintiff and struck him with great force and violence; that at another time, when the plaintiff accidentally knocked over a bottle of bay rum in the bathroom and spoke about it at the dinner table, the defendant seized a plate and threw it and its contents at the plaintiff, and, when the plaintiff procured for the defendant another plate, the defendant caught it and took it away from the plaintiff and hurled it at him with great force; that on this occasion she called him a "damn fool" and an "idiot," and said just one more word from him and

she would "fix" him; that the defendant neglected her home and home duties and the plaintiff, and gave the greater part of her time to the National Association for the Prevention and Study of Tuberculosis and the sale of Red Cross stamps; that she has also given much of her time to engagements of the nature of matinees, parties, luncheons, women's clubs, and directors meetings; that the defendant has traveled for long periods of time to California, New York, and other places; that she has also estranged the plaintiff's daughter and deprived the plaintiff of her love and affection; that she continually misrepresents the plaintiff to his said daughter and tries to establish in the mind of said child that her father is unworthy of being trusted; that the plaintiff has endeavored to discharge his marital obligations, and has done all things within his power to fulfil his duty to his wife and child.

The decree appealed from recites that the cause came on for further consideration, the same having been heretofore submitted to the court on the petition of the plaintiff, the answer and cross-petition of the defendant, the supplemental answer and cross-petition to the answer and cross-petition and supplemental answer and cross-petition of the defendant, and the evidence and arguments of counsel. The decree is very long, and it will not be necessary to specifically point out the several findings. It is enough to say in a general way the decree is for the plaintiff and against the defendant, except that the court finds that it is proper to award the defendant and cross-petitioner permanent alimony in the sum of \$25,000, together with the household goods, except the personal effects and belongings of the plaintiff, now situated in No. 116 South Thirty-sixth street, Omaha, Nebraska. The court also finds that it is proper to award the defendant, in lieu of interest upon permanent alimony, temporary alimony, in some amount for the support of the defendant and the child, Camilla. The court further finds that the plaintiff is possessed of property, real and personal, of the reasonable value of \$110,000. The court further finds in favor of the plaintiff

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and against the defendant upon the charges of extreme cruelty practiced on the part of the defendant toward the plaintiff, and finds that the defendant has been guilty of acts and conduct toward the plaintiff constituting extreme cruelty without any just cause or provocation therefor, and as alleged in plaintiff's petition and established by the evidence, and that said plaintiff is entitled to an absolute divorce from said defendant on the ground of extreme cruelty practiced by the defendant toward the plaintiff. The court finds against the said defendant generally upon her answer and cross-petition to the plaintiff's petition. We think it unnecessary to further quote from the findings and judgment of the court.

The record discloses that Mrs. Edholm, prior to her marriage to Mr. Edholm, had spent some time in coaching and instructing public readers and platform speakers. Mr. Edholm was a jeweler, and seems to have worked hard at his trade, and also as a salesman in his store. Their occupations had been of a different character and perhaps were not well calculated to make them sympathize with each other. While Mr. Edholm was successful in his line of business, that fact does not seem to have commended him to Mrs. Edholm. She is shown to be a woman of much intelligence and great force of character, but she seems to have a crisp temper that is most easily provoked, and at such times she is subject to ungovernable fits of rage. Mr. Edholm was in feeble health and afflicted with insomnia. He was in a condition that required and demanded the affectionate services of a faithful wife. They lived together as husband and wife about 12 years, and it is not at all in doubt that they led most unhappy lives. Apart from the matter of physical violence, the defendant is shown to have unnecessarily annoyed, disturbed and mistreated the plaintiff. She dominated the husband, and the evidence shows that she made existence utterly miserable for him. Mrs. Edholm claims that the plaintiff was niggardly and mean in the matter of household expenses. They had their own house, and therefore they had no rent

to pay. Their living expenses are shown to have been about \$200 a month, which he paid. The evidence clearly shows extreme cruelty on the part of the defendant toward the plaintiff. The plaintiff seems to have treated his wife kindly. She did not permit him to say much, but he was apparently trying as best he could to conciliate her and to get along agreeably. It is not necessary to further dwell upon the details of the evidence. It is fully sufficient to sustain the decree of the district court.

Mrs. Edholm was allowed \$25,000 alimony, and all the household furniture, and the additional sum of \$50 a month for the support of the child. From this allowance of alimony the plaintiff has taken his cross-appeal. This would seem to be a very liberal allowance, perhaps more than the defendant should have been given. It is for us to remember that the judge of the district court was closer to the parties than we are, and that he had a better opportunity to judge than we have. In this particular we do not care to disturb his findings and judgment.

The judgment of the district court is in all things

AFFIRMED.

MORRISSEY, C. J., and FAWCETT, J.

We think the judgment should be affirmed, except that the amount allowed as alimony should be materially reduced.

SEDGWICK, J., concurring.

I think that the case is not free from doubt, but the evidence before the trial court appears sufficient to establish that these parties cannot reasonably live together as husband and wife. The trouble appears to arise from the conduct of the defendant, amounting to extreme cruelty within the meaning of the statute. The amount allowed the defendant seems large under the circumstances, but it would perhaps be difficult to fix any other amount with certainty that would be nearer to exact justice between the

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parties. For the reasons above stated, I agree that the judgment of the trial court should be affirmed.

LETTON, J., concurs in the above.

ROSE, J., dissenting.

With the exception of domestic conduct growing out of marital infelicity, I find nothing reflecting on either of the parties. They have a daughter growing into womanhood. She is not responsible for having been born into an unhappy home. In determining the merits of the controversy between her parents, she should not be subjected to avoidable embarrassment. I hoped the opinion adopted by this court and published by the state would justify itself, and that it would omit unnecessary details of the charges of cruelty made by the father against the mother. I therefore dissent from the form and substance of the opinion.

STATE, EX REL. CHARLES THAYER, APPELLEE, v. SCHOOL DISTRICT OF CITY OF NEBRASKA CITY ET AL., APPELLANTS.

FILED FEBRUARY 5, 1916. No. 19477.

1. **Schools and School Districts: CONDUCT OF SCHOOLS.** What shall be done in the common schools in an educational way is to be determined at school meetings held in each school district, and also by the officers of each school district as the statute may direct.
2. **Mandamus: INSTRUCTION IN GERMAN: DUTY OF BOARD.** Where the parents or guardians of 50 children above the fourth grade residing in such a school district as is referred to in section 6941, Rev. St. 1913, petition the school board of the said district requesting that German be taught in said school as an elective study, it is the duty of the board to comply with the prayer of the petition and to make provision for the teaching of German in said school as required by said section, and it may be compelled to do so by mandamus.
3. **Statutes: CONSTRUCTION.** The fundamental principle of statutory construction is ascertainment of the intent of the legislature. *People v. Weston*, 3 Neb. 312.

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4. ———: ———. "In construing a statute, words should be given their usual meaning." *State v. Byrum*, 60 Neb. 384.
5. ———: ———: EXCEPTIONS. The court will not read into a statute exceptions not made by the legislature.
6. ———: ———. "Where a statute is clear and unambiguous in its terms, it is the duty of the court, in construing it, to give the language used by the legislature its plain and ordinary meaning." *State v. Bratton*, 90 Neb. 382.
7. ———: CONSTITUTIONALITY: PROVINCE OF COURTS. It is not for the court to inquire into the motives of the legislature in the enactment of laws, or to determine their wisdom, or the lack of it. *Stewart v. Barton*, 91 Neb. 96.
8. ———: CONSTRUCTION. It is for the legislature to determine the policy of any enactment it may make. The legislature and the courts each act in a separate capacity, and each is independent of the other.
9. ———: REPEAL BY IMPLICATION. "A legislative act complete in itself is not inimical to the provisions of section 11, art. III of the Constitution; and where such an act is repugnant to, or in conflict with, a prior law, which is not referred to nor in express terms repealed by the later act, the earlier statute is repealed by implication." *State v. Hevelone*, 92 Neb. 748.

APPEAL from the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Affirmed*.

William H. Pitzer and D. W. Livingston, for appellants.

W. F. Moran and Jean A. Cobbey, contra.

HAMER, J.

This is an appeal from the judgment of the district court for Otoe county in favor of the relator in a mandamus case touching the teaching of the German language in the Sixth street division of the school district of Nebraska City. The alternative writ relates that the city of Nebraska City is a municipal corporation having a population of 5,300 inhabitants; that the school district of the city of Nebraska City is a duly organized school district under the laws of the state, and comprises the city of Nebraska City and the surrounding country. It then sets up the names of the members of the board of education, and says that they con-

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stitute the respondents. The school district appears to be divided into six divisions. It is alleged that there is one school building in each division in which school from the first to the eighth grades is being taught, and that said schools are under direct control of the board of education of said city. The relator alleges that he is a citizen of the United States and of the state of Nebraska and of the city of Nebraska City; that he resides in that division of said school district known as the Sixth street division, and has resided therein for a great many years, and that one of his children attends the said Sixth street school between the fifth and eighth grades; that on the 15th day of May, 1915, being more than three months previous to the opening of the fall term of said school for the year 1915, and in the said Sixth street division, there was a written request filed with said board of education signed by the relator and the parents or guardians of at least 50 pupils above the fourth grade attending said Sixth street school in said school district, and requesting that the German language should be taught in said division of said school district as an elective study; in the request the names of the pupils above the fourth grade are given, also the names of the parents or guardians, together with the house number and place of residence; that the respondents and the said board of education failed, neglected and refused to provide for the teaching of said German language and refused to comply with the request; that the relator and the petitioners signing said request are without an adequate remedy at law unless the respondents and the board of education are compelled to perform their duty by an order of the court; that the relator and the signers of said request and numerous other persons in the said Sixth street division of said school district will be deprived of the right to have said German language taught in the said division of said school as is provided by the laws of the state of Nebraska.

The respondents filed an answer admitting the population of the city of Nebraska City as alleged, also that the city is duly organized and that the school district is sub-

divided, and that in the subdivision known as the Sixth street school there is one building in which school is taught under the direct control of said board of education; that the relator resides in said Sixth street division of said school; that there was a request filed as set out in the alternative writ, which was signed by the parents or guardians of 50 children who would attend said school during the 1915 fall term; that the said school children were in the grades above the fourth grade; that the respondents, as members of the board of education, refused to provide for the teaching of the German language in said Sixth street school in the grades above the fourth grade, as requested and as petitioned; that Charles Thayer, the relator, is a citizen of the United States and of the state of Nebraska and of Nebraska City, and that one of his children attends said school in the grade between the fifth and eighth grades. It is further alleged that no grade higher than the eighth grade is taught in said Sixth street school; that to provide for the study of the German language in the grades in said school above the fourth grade would require the expenditure of a considerable amount of money both in providing facilities and rooms for class work and the means of giving instruction, and that before incurring this expense the respondents felt justified in canvassing the signers of said petition for the purpose of ascertaining whether or not the persons who had signed the same as parents and guardians of the children mentioned had intended, by so signing, to elect that the children represented by them, and going to make up the number of children set out in said petition, should take instruction in the German language if such instruction was provided for; that the canvass was made by impartial persons under the direction of the respondents beginning about June 20, 1915, and that the same was completed about August 2, 1915; that in making this canvass the committee of the defendants to whom the matter was referred addressed a communication to the signers of said petition. It appears by the communication that an ex-

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pression was asked in writing, and that this expression was taken. It is alleged that by reason of this canvass the result is shown that the parents and guardians of 49 pupils signing said petition declared when they signed the same that they did not understand or intend by so doing that they were electing to have their said children study the said German language, and that they did not so elect; that there remained parents and guardians, signers of said petition, actually electing to have their children study the German language in said grades in the fall term of 1915, of not more than 15 children.

The respondents further alleged that the Sixth street school was a common school providing free instruction in the elementary subjects to all pupils of school age in that subdistrict; that the said school was maintained by general taxation and by apportionment from the general school fund of the state; that it had an established course of study in the common branches, including instruction in the English language, but not in any foreign language; that said course of study was in harmony with that prescribed and recommended by the department of education of the state of Nebraska, and corresponds with that in other grade schools in the state; that, according to this course of study, all pupils in attendance at said school were classified; that, as so conducted according to a long-established and universally recognized custom determining and defining common schools and the common branches according to a long-established and universally recognized public policy of the state in the plan and organization of its public schools, particularly as expressed, understood and intended by the Constitution of the state and by the laws of the United States in making provision for the maintenance of such schools as common schools, the said law of the state of Nebraska known as chapter 31, Laws 1913, and now known as section 6941, Rev. St. 1913, in so far as it is sought to be invoked herein to require the said course of study in said Sixth street school to be amended by making provision for an elective

course of study in the German language in the grades of said school above the fourth grade, is contrary to the public policy of the state as declared and understood in sections 3-6, art. VIII of the Constitution of the state of Nebraska, and in sections 7 and 12 of the act of congress of April 19, 1864 (13 St. at Large, ch. 59, p. 47), known as the enabling act, providing the conditions for the admission into the Union of the state of Nebraska; that the effect of the departure from and violation of said policy as contemplated by the said act will be to greatly disturb the general class work in said grades and conflict with equal rights of others than the relator and the said petitioners, interfere with the orderly progress of said school work generally, and greatly detract from the efficiency of the general instruction in the common branches now provided in said grades, besides entailing great expense upon the taxpayers and revenues of the said school district, both in providing for facilities for the giving of said instruction and the expense of said instruction itself; that the effect of the said act of the legislature as applied to the said Sixth street school will be local and special, resulting in special privileges being granted to some individual pupils and patrons to the prejudice of others possessing equal rights in said school, and in an unequal and unfair distribution of the school funds and revenues by the Constitution and laws of Nebraska for the support and maintenance of common schools; that the said act of the legislature is unconstitutional and void in so far as it is claimed to be applicable to the schools of the class in which said Sixth street school falls, and for the following reasons: (1) It is class legislation, and provides a local and special law for the management of certain special and local public schools, in contravention of the express inhibition of section 15, art. III of the Constitution, prohibiting the passage by the legislature of Nebraska of local or special laws providing for the management of public schools, or granting special privileges to any individual. (2) It is violative of the provisions of sections 1, 4, 6, art. IX

of the Constitution, requiring taxation for the support of such schools to be uniform in rate and as to valuation of property. (3) The classification made and contemplated by said act is arbitrary, in that no discretion is allowed or conferred upon the governing authorities of the schools to which it relates concerning the study of the language requested. (4) The said act is not designed to subserve the interests of the public and citizens and residents of the state of Nebraska, but, on the contrary, is distinctly subversive of the public interest and destructive of the plans and organization of the public schools of Nebraska below the high school grades. (5) It is amendatory of section 6949, Rev. St. 1913, but is void because it fails to comply with the constitutional requirements relating to amendatory acts. (6) It creates an additional burden upon the entire property of the school district for the special benefit of a few of the pupils of the district classified arbitrarily, and does not provide for defraying the expense of such instruction, special as it is in its character, so as to relieve those not benefited and to whom the said act does not apply free from the burden of taxation necessary for the support of the same.

The respondents prayed that their amended answer should be deemed and held to be sufficient in fact and law, and that the motion and prayer of the relator for a peremptory writ of mandamus should be denied with costs.

The case was heard upon a demurrer of the relator to the answer, which was sustained, and the respondents elected to stand upon their answer. Judgment was rendered for the relator on the pleadings. It was ordered that a peremptory writ of mandamus issue against the respondents, the school district of Nebraska City, and the members of the school board of the said school district, commanding them to employ a competent teacher and to provide for the teaching in said Sixth street school, above the fourth grade, as an elective study, the German language. There was a motion for a new trial in which it was alleged that the court erred in sustaining the demurrer of the relator to the

answer and in finding the issues in favor of the relator, and in entering judgment in his favor, and in directing the issuance of a peremptory writ of mandamus to the respondents. This motion for a new trial was denied.

We are called upon to determine whether the answer of the respondents is sufficient or insufficient to set up a bar.

It would seem to be the general theory of the law concerning the establishment and maintenance of schools that they are in the hands of the people. What shall be done in the common schools in an educational way is to be determined at school meetings held in each school district, and also by the officers of each district as the statute may direct. The officers of each school district are charged with the obligation of carrying out the will of the people as it finds expression in the school meetings and in the legislature.

The respondents contend that because out of 64 signers of the petition parents or guardians of 49 did not elect to have their children take German, and that those of only 15 did so elect, therefore only those should be counted. The statute (Laws of 1913, ch. 31, Rev. St. 1913, sec. 6941) reads: "An act to provide for and to regulate the teaching of modern European languages as an elective course of study in the schools of the state of Nebraska.

"Be it enacted by the people of the state of Nebraska: Section 1. In every high school, city school or metropolitan school in this state the proper authorities of such school districts shall upon the written request, when made at least three months before the opening of the fall term of such school, by the parents or guardians of fifty pupils above the fourth grade then attending such school, employ competent teachers and provide for the teaching therein, above the fourth grade, as an elective course of study, of such modern European language as may be designated in such request: Provided, that not more than five hours each week and not less than one period each day shall be devoted to the teaching of any such modern European language in any elementary or grade school."

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An examination of this section will show that the written request to be made by the parents or guardians of 50 pupils puts upon the parents no burden of stating that the children will study the language requested to be taught. The parents and guardians who desire a school of this kind have only to petition for it regardless of the studies which they intend their own children shall take. The desire to establish a school where more than one language is taught seems to justify the petition, and to put upon the board of education the duty of maintaining the school. It may readily be seen that some years there might be only a few pupils studying the foreign language, and other years there might be an increased number. Guardians or parents of 50 pupils are given the right under the statute of compelling the establishment of the school by presenting their petition for it. The statute is so plain that there appears no doubt about it. The meaning attempted to be attached to the statute by the respondents adds important provisions which the legislature could not have intended. No language is used which in any manner indicates the number of pupils intending to take the study. If it shall be said that only those who intend that their children shall study the language during the present school year can sign the petition, then the answer must be that the legislature said nothing about the conditions sought to be imposed. The contention made by the respondents has nothing in either the letter or the spirit of the act which sustains it. Of course, the only thing to be done is to ascertain the intent of the legislature. That may only be done by considering the words used and the purpose. *State v. City of Lincoln*, 68 Neb. 597.

In *People v. Weston*, 3 Neb. 312, it is held that the fundamental principle of statutory construction is ascertainment of the intent of the legislature. It was not for the school board to say whether it wanted German taught or not. It is required, when the requisite number petition that German should be taught, to make the necessary provision, no difference how many pupils are studying the lan-

guage. The number might start out with 5 and soon grow to 50. By the act of the legislature above quoted the board is required to provide for the teaching of that language. The act requires a petition signed by parents or guardians of 50 pupils. A class containing 50 children studying a foreign language might not be a convenient class as to numbers. It is clear that the legislature meant that the school board should not refuse to establish the class where parents or guardians of 50 pupils petitioned for it. A class of 15 or 20 pupils would probably be preferable to a class of 50, but the exact number is not material.

In *State v. Byrum*, 60 Neb. 384, it is said in the body of the opinion, and also in the syllabus, that, "in construing a statute, words should be given their usual meaning."

In *Siren v. State*, 78 Neb. 778, this court held that "the court will not read into a statute exceptions not made by the legislature."

In *State v. Bratton*, 90 Neb. 382, it was held that, "where a statute is clear and unambiguous in its terms, it is the duty of the court, in construing it, to give the language used by the legislature its plain and ordinary meaning."

The courts have no jurisdiction of matters committed to the legislature. *Cole v. Village of Culbertson*, 86 Neb. 160. It is not for the court to inquire into the motives of the legislature in the enactment of laws, or to determine their wisdom, or the lack of it. *Stewart v. Barton*, 91 Neb. 96.

The respondents object that it is contrary to public policy, as shown in sections 3-6, art. VIII of the Constitution; that instruction in modern languages is repugnant to the idea of a "common school." Every teacher probably knows that a little child can learn a language better than one who is more mature. Children talk to each other almost at once with the same naturalness that they play together, and the language in which they talk together is not very material, as they are able at once to understand. Of course,

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the easy place to begin instruction in a foreign language is in the grades. The little ones are always ready to learn and are capable of doing so.

It is contended by the respondents in this case that "common schools" are common property; that they belong to the youth of any defined district. The idea is shadowed forth that the foreign-born resident is not entitled to education in his own tongue furnished at the public expense. To this it may be said that the education is not alone for him. It is for the native-born citizen as well as for the citizen of foreign birth. Both may profit by the study of a foreign tongue. Both do profit necessarily by the study of the foreign language along with the English language. The two languages will be considered and studied together, and the pupil, whether foreign-born or native-born, will profit by the fact that he studies both languages. In this case the only question is whether the legislature did what the statute says it did, and it is for the legislature to determine the policy of the enactment. It is not for the courts to attempt to infringe upon the power of the people as expressed through the legislature.

"A legislative act complete in itself is not inimical to the provisions of section 11, art. III of the Constitution; and where such an act is repugnant to, or in conflict with, a prior law, which is not referred to nor in express terms repealed by the later act, the earlier statute is repealed by implication." *State v. Hevelone*, 92 Neb. 748.

A statute complete in itself is not repugnant to the Constitution, though it may conflict with some other statute. *Nebraska Loan & Building Ass'n v. Perkins*, 61 Neb. 254; *Wenham v. State*, 65 Neb. 394; *Stewart v. Barton*, 91 Neb. 96.

We are unable to find any reason for setting aside the judgment of the district court, and it is therefore

AFFIRMED.

SEDGWICK, J., concurs in the conclusion.

CHARLES M. HADLEY, ADMINISTRATOR, APPELLEE, v. UNION
PACIFIC RAILROAD COMPANY, APPELLANT.

FILED FEBRUARY 19, 1916. No. 18439.

1. **Damages.** A verdict for plaintiff assessing the total damages at \$25,000, under the evidence set out in the opinion, *held* to be excessive.
2. **Statutes; CONSTRUCTION.** In construing a federal statute, this court will follow the construction placed upon it by the federal courts.
3. **Damages; REMITTITUR.** In an action under the federal employers' liability act (35 U. S. St. at Large, ch. 149, p. 65), where the court has instructed the jury that the contributory negligence of deceased has been shown, but the jury makes no deduction in the amount of the verdict because of such negligence, the court may order such remittitur as seems proper under the evidence.
4. **Damages; APPORTIONMENT.** A general verdict for the plaintiff may be returned by the jury in an action brought by the administrator under the federal employers' liability act for the benefit of the widow and minor children of the deceased employee without apportioning the damages among the beneficiaries.

APPEAL from the district court for Cheyenne county:
HANSON M. GRIMES, JUDGE. *Affirmed on condition.*

Edson Rich, A. G. Ellick, B. W. Scandrett and Miles & McIntosh, for appellant.

Wilcox & Halligan, R. W. Devoe and J. M. Swenson, contra.

MORRISSEY, C. J.

This is an appeal from a judgment recovered against defendant in an action brought under the federal employers' liability act, 35 U. S. St. at Large, ch. 149, p. 65. Plaintiff is administrator of the estate of Charles M. Cradit, who died March 14, 1913, from injuries received while in the employ of defendant as a railroad brakeman on one of its interstate freight trains. The suit was for the

benefit of the widow and two surviving children. Deceased received his injuries while in the caboose of his train, when it was run into and wrecked by the engine of another of defendant's trains.

This accident occurred at a station known as Mile Post 426, located between Sidney, Nebraska, and Cheyenne, Wyoming. The evening before Cradit left Cheyenne with his train, designated as extra 504 east, for Sidney, Nebraska, which is 102 miles distant from Cheyenne, and this section of the road, constituting a freight division, is known as the fourth district of the Nebraska division. An extra freight train is designated by the number of its engine and the direction in which it is going. When Cradit's train left Cheyenne, the weather conditions were unsettled on that division. They continued to grow worse during the night, and at the time of the accident a severe storm or blizzard was raging. Closely following extra 504 east was another freight train, designated extra 501 east. Defendant's line was double-tracked west to Mile Post 426, and from that point west to Dix its line was single-tracked, where it again diverges into a double track. At all points on its system it is equipped with an automatic block signal system by which the track is divided into blocks, and by which a red light is displayed one block in the rear of every train, and this light remains red until the train has passed out of that block and into another, when the light turns to green. Red lights signify danger, and green lights signify that the track is clear. These two trains appear to have been run in the usual way; extra 501 east being a block behind extra 504 east until they reached Dix. Here extra 504 pulled in on a passing track. And soon thereafter extra 501 arrived, and the two trains stood for some time on the tracks at Dix. The storm had become so severe that the acetylene headlights were extinguished, and common white lanterns were substituted therefor.

It is claimed that, while these trains were waiting at Dix for passenger trains to go through, the deceased and his conductor went to the cab of engine 501 and visited with

the crew of that engine; that conductor Phillips of extra 504 east had a conversation with Engineer Cameron and Fireman Long of extra 501 east, in the presence of Cradit, in which the engineer said that it was hard to see the block signals, and asked Conductor Phillips to do a good job of flagging, and "use lots of fusees all the way down," and also asked that, if stops were made, fusees be thrown out and a torpedo put down.

Cradit's train left Dix at 2:35 A. M., and arrived at Potter, the next station east, at 3:05 A. M., thus clearing the block for extra 501 east, which thereupon left Dix and arrived at Potter at 3:35 A. M., where it took water and departed at 3:45 A. M. The engineer pulled out of Potter without orders from the conductor, and the conductor was left at that station while his train proceeded. While these trains had been proceeding eastward, extra freight 510 west had been made up at Sidney, and started for Cheyenne at 1:10 A. M.; but the storm was so violent that it required 1 hour and 55 minutes to reach Mile Post 426, 11 or 12 miles west of Sidney, arriving there at 3:05 A. M. The engine's supply of water had been exhausted, and this condition was reported to the train dispatcher at Sidney. The dispatcher thereupon ordered extra 504 east to pick up engine 510 west and take it to Sidney. The severity of the storm was such that lanterns could be seen but a few feet. The switch had been left partially open and blocked by snow, and the conductor of the west-bound train testified that in making his way from the caboose to the station he could not face the storm, but was compelled to walk backward, and that it took him 35 minutes to travel the length of his train. Communication with the train dispatcher was had over the telephone, and the conductor testified that the dispatcher was notified that the storm was so severe that the trainmen could not see, and was advised to let extra 504 east proceed and have extra 501 east pick up the engine of the west-bound train. This the dispatcher refused to do, and the engine crews began the work of

clearing the switch to make the necessary couplings to pick up the stalled engine.

Cradit's train had reached Mile Post 426 about 3:35, and the engineer "whistled out a flag." While the engine crews of extra 504 east and 510 west with their head brakemen were endeavoring to clear the switch and couple the stalled engine into the train of extra 504 east, extra 501 east, which left Potter without its conductor, ran past the block signals, and collided with the caboose of extra 504 east, killing Cradit, Conductor Phillips, three stockmen, injuring two others and setting fire to the caboose. This collision occurred 30 or 40 minutes after the arrival of Cradit's train at Mile Post 426.

Under defendant's rules, it was Cradit's duty, when his train stopped and the engineer "whistled out a flag," to go out and put down torpedoes, throw out fusees, and protect his train from a rear-end collision. This he did not do.

There was a verdict for plaintiff in the sum of \$25,000, which the trial court reduced to \$15,000, and defendant has appealed, urging 38 separate assignments of error.

Plaintiff charges defendant with negligence in operating the three freight trains, heretofore mentioned, while this violent storm was raging, and in permitting extra 501 east to run in such close proximity to extra 504 east. It is claimed that it was negligence on the part of the assistant superintendent at Sidney to send out the west-bound train under the circumstances, and with knowledge of the storm, and that it was negligence on the part of the train dispatcher in directing extra 504 east to pick up the stalled engine, when that train ought to have been permitted to continue into Sidney and let the train which he knew was following in close proximity, and which finally caused the accident, pick up the engine; that it was negligence for extra 501 east to be operated without its conductor, and for its engineer to run past the block signals.

The wind was blowing at the rate of 30 miles an hour or more; snow was falling, or blowing; there was difficulty in observing the block signals, if, in fact, they could be ob-

served at all, and the dispatcher and assistant superintendent knew that it was an unusual storm. But the passenger and mail trains went over the line during the night. None of the trainmen had reported that it was impossible to see the block signals, or that the headlights were not burning. It cannot be said that defendant was guilty of actionable negligence for a mere failure to tie up its trains. On the other hand, it is clear that there was negligence on the part of the engineer of extra 501 east in leaving the station at Potter, without his conductor, and proceeding through this storm without observing the block signals, set at danger, in the rear of extra 504 east. These block signals are admitted to have been working, but the members of the engine crew claim they were unable to see them because of the severity of the storm. However, they knew the distance from Potter to Mile Post 426, and the location of these block signals, and also knew that they were following closely behind another train, and that with the weather conditions prevailing that train was likely to be stalled, and they had been warned by the dispatcher that extra 504 east was at Mile Post 426, "and might not be out before they got there, and to look out for her." The dispatcher knew that it required 1 hour and 55 minutes for the west-bound train to make the run of 11 or 12 miles to Mile Post 426, and that in doing so the engine exhausted its supply of water. He knew that east-bound extra 504 had left Potter only 36 minutes ahead of extra 501 east. When he ordered extra 504 east to stop at Mile Post 426 and do work which would require some time under the existing conditions, he was requested by the conductor of the west-bound train and the engineer of extra 504 east to let the first train proceed and leave the second train to do the switching and pick up the stalled engine. The conductor of the west-bound train testified that, through the operator, he had a conversation over the telephone with the dispatcher, and "told him we could not see, the storm was so severe, and to let extra 501 go." The conductor asked to

have the first east-bound train proceed and leave the second east-bound train to pick up the engine of his train. It would seem that due regard for the safety of the employees would have impelled him to grant this request. Had it been granted, in all probability the accident would have been avoided. "Furthermore, the negligence of the train dispatcher need not have been the sole and only cause of the accident to charge the defendant with negligence. If his negligence contributed to the accident — that is to say, if his action had a share in bringing about the disaster — the defendant will be liable." *Sandidge v. Atchison, T. & S. F. R. Co.*, 193 Fed. 867, 875.

Appellant justifies the action of the dispatcher in this regard by saying that, had he granted this request, it would have delayed the removal of the west-bound train an hour or two, and that by that time the snow would have accumulated around this train in such quantities as to block traffic on its lines. If the dispatcher realized that the storm was of such severity as this, he ought to have known that there was grave danger of train crews being unable to see the block signals, and, as he was running the trains in close proximity, prudence would have dictated that he grant the request of the trainmen, which in itself was warning of danger, and permit the first train to proceed.

Appellant denies that any negligence on the part of the assistant superintendent was shown, or that the acts charged constitute actionable negligence, and says the court erred in refusing its requested instructions withdrawing from the jury consideration of the acts of negligence charged against him. The conductor of the west-bound train testified that he and the assistant superintendent had different conversations before he took out the train. The conductor advised that the train be split in two, because, owing to the severity of the storm, the engine could not pull the train through to Potter, the next watering station. The assistant superintendent assisted in cleaning out the turntable that night, and at the second conversation they had the assistant superintendent stated in the most positive lan-

guage that there was "no use of running the train." It appears that he knew the weather conditions; that the conductor, who was an experienced railroad man, called his attention to the impracticability of sending out the train; that he admitted the lack of necessity for doing so, and yet, in the face of this, he sent it out. Of course, this act alone did not cause the accident, but it formed one link in a chain of incidents culminating in the wreck. The negligence of the engineer of extra 501 east and of Conductor Phillips of extra 504 east and the contributory negligence of the deceased is conclusively shown. It follows that there was no error in submitting these issues to the jury.

It is urged by appellant that there can be no recovery, because Cradit assumed the risk incident to his employment and to the peculiar circumstances under which the trains were operated that night. It is said in the brief that the action of Cameron in running his train past the block signals would constitute actionable negligence, "unless Cradit, by his conduct, had waived his right to predicate a cause of action thereon, or was aware of the fact that Cameron was not depending upon the block signals for the safe operation of his train, and was willing to proceed in the face of that danger, thereby assuming the risk." Engineer Cameron testified that he told Conductor Phillips, in the presence of Cradit, to do a good job of "flagging," and appellant seriously contends that Cradit knew that the engineer in proceeding east from Dix would not depend upon the block signals, but upon the "flagging" to be done by Cradit; that, because of this alleged conversation and understanding, Cameron no longer owed Cradit the duty to operate his train under the block signal system. There was a conflict in the testimony as to this alleged conversation and agreement. The jury made a special finding that the conversation was not had.

In *Grand Trunk W. R. Co. v. Lindsay*, 201 Fed. 836, plaintiff was a switchman on defendant's railroad, and in making couplings was obliged to go between the cars. There was conflicting evidence respecting the giving of a signal to the

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engineer. As in this case, the jury found for the plaintiff. In the concluding paragraph of the opinion on rehearing the court said: "Under the employers' liability act, plaintiff's negligence, contributing with defendant's negligence to the production of the injury, does not defeat the cause of action, but only lessens the damages, and, if the cause of action is established by showing that the injury resulted 'in whole or in part' from defendant's negligence, the statute would be nullified by calling plaintiff's act the proximate cause, and then defeating him, when he could not be defeated by calling his act contributory negligence. For his act was the same act, by whatever name it be called. It is only when plaintiff's act is the sole cause — when defendant's act is no part of the causation — that defendant is free from liability under the act."

In *Wright v. Yazoo & M. V. R. Co.*, 197 Fed. 94, the court said: "While the doctrine of assumption of risk sometimes shades into that of contributory negligence, there is a clear distinction between the doctrines, an employee being held to assume the risk of ordinary dangers of his occupation, and also those risks which are known to him, or are so clearly observable that he may be presumed to know of them, while contributory negligence constitutes omission of an employee to use those precautions for his own safety which ordinary prudence requires."

The finding of the jury on this question is conclusive of the question.

It is urged that the verdict is so excessive as to indicate passion or prejudice on the part of the jury. Deceased was 31 years of age, with a life expectancy of approximately 34 years. He was earning from \$85 to \$100 a month, but used from \$15 to \$18 a month for his personal expenses while out on his work. The remainder was contributed to the support of his family. No proof was offered to show that deceased's earning capacity would increase with the years. "It ought to be assumed that plaintiff proved his earnings at their best." *Hoffman v. Chicago & N. W. R. Co.*, 91 Neb. 783.

Tables of expectancy and the present worth of judgments are always more or less unsatisfactory. It is never possible to ascertain with mathematical accuracy the pecuniary loss which a family will suffer from the death of the breadwinner, but, taking his wages at \$100 a month, the maximum, and deducting therefrom the amount which he spent for his personal expenses, and calculating the present value at the date of the verdict, the evidence will not sustain a verdict in excess of \$18,000; but the verdict as returned is not so excessive as to warrant the court in setting it aside. We think \$18,000 may reasonably be taken as the gross amount of damages. The court properly directed the jury that deceased was guilty of contributory negligence, and that the damages should be diminished in proportion to the amount of negligence attributable to him. By special finding the jury found that nothing should be deducted, and no deduction was made by the jury. By direction of the trial court a remittitur of \$10,000 was entered, and the verdict permitted to stand at \$15,000. The record does not disclose the court's reasons for making the remittitur; whether it was because he regarded the original verdict as \$10,000 too high; whether he made the deduction ordered because of the contributory negligence of deceased, or whether he thought it ought to be deducted for both reasons. In any event, it is not material to a disposition of the case here.

Having reached the conclusion that without making any deduction because of the contributory negligence the verdict ought to be reduced to \$18,000, we are now required to determine what amount, if any, should be remitted because of deceased's contributory negligence. Our right to determine this matter is questioned by appellant, and in place of making the reduction we are asked to reverse the case for a new trial. This being a federal statute, the interpretation placed upon it by the federal courts will be followed. *South Covington & C. Street R. Co. v. Finan's Adm'x*, 153 Ky. 340.

In *Yazoo & M. V. R. Co. v. Wright*, 207 Fed. 281, the refusal of the trial court to instruct that deceased was guilty of contributory negligence was assigned as error, and on the motion for a new trial it was found that he was guilty of contributory negligence. But the court ordered a remittitur, which was accepted, and the court said the railroad company could not complain.

In *Pennsylvania Co. v. Sheeley*, 221 Fed. 901, the court had this very question before it, and disposed of it in the following language: "It seems probable that the jury did not make allowance for contributory negligence as the statute requires. There must, therefore, be another trial, unless this error can be cured by a remittitur. In making to plaintiff an offer of conditions upon which part of a judgment may stand, we cannot take the place of the jury. We must only be sure that no substantial injustice comes to the party against whom the judgment is maintained. If the conditions so fixed seem unjust to the plaintiff, he can protect himself by declining to accept the offer. The utmost which defendant in this case can claim is that the jury made no allowance on account of Sheeley's conduct, and so that the \$6,500 represents the total damages. The negligence of the engineer being established according to the theory of the petition, we think there would be no fair room to say that Sheeley's negligence should be considered as more than one-half as much as the engineer's, or more than one-third of the whole. It follows that if plaintiff desires to accept a judgment for two-thirds of the amount found below, and within 30 days files evidence of that acceptance in accordance with our practice, the judgment will be affirmed; otherwise, it will be reversed and remanded for new trial."

In the instant case negligence may be traced to so many different people that it is difficult to determine the proportion that ought to be charged to deceased, but surely it cannot be more than one-fourth of the whole, and this deduction will be made from the \$18,000, which we find to represent the total damages.

The point is made in the brief that there is not sufficient evidence to prove the separate pecuniary loss of each of the parties for whose benefit the action was brought. The jury is not required to apportion the damages among the beneficiaries. A general verdict for the plaintiff may be returned. In a very recent case the supreme court of the United States passed upon this question and said: "Under Lord Campbell's act (9-10 Victoria, ch. 93, sec. 2) and in a few of the American states the jury is required to apportion the damages in this class of cases. But even in those states the distribution is held to be of no concern to the defendant, and the failure to apportion the damages is held not to be reversible error (*Norfolk & W. R. Co. v. Stevens, Adm'r*, 97 Va. 631, 46 L. R. A. 367; *International & G. N. R. Co. v. Lehman*, 30 Tex. Civ. App. 3); certainly not unless the defendant can show that it has been injured by such failure. The employers' liability act is substantially like Lord Campbell's act, except that it omits the requirement that the jury should apportion the damages. That omission clearly indicates an intention on the part of congress to change what was the English practice so as to make the federal statute conform to what was the rule in most of the states in which it was to operate. Those statutes, when silent on the subject, have generally been construed not to require juries to make an apportionment. Indeed, to make them do so would, in many cases, double the issues; for, in connection with the determination of negligence and damage, it would be necessary also to enter upon an investigation of the domestic affairs of the deceased—a matter for probate courts, and not for jurors. If, as in the *McGinnis* case, the plaintiff sues for the benefit of one who is not entitled to share in the recovery (*Taylor v. Taylor*, 232 U. S. 363; *North Carolina R. Co. v. Zachary*, 232 U. S. 248), and if her inclusion in the suit might increase the amount of the recovery, the defendant may raise the question, in such mode as may be appropriate under the practice of the court in which the trial is had, so as to secure a ruling which will prevent a recovery for one not

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entitled to share in the benefits of the federal act. But no such question was or could have been raised in the present case, since, as matter of law, the wife and minor children were all to be treated as entitled to share in the amount recovered for the death of the husband and father." *Central V. R. Co. v. White*, 238 U. S. 507.

It is not necessary to further extend the discussion of the questions pressed upon our consideration. Those not discussed have been fully considered, but are not thought to be controlling. We are of the opinion that the case was fairly presented to the jury, and that no substantial error of law to the prejudice of appellant was committed, and, it is therefore ordered that, if the plaintiff file a remittitur in the sum of \$1,500, leaving the judgment \$13,500, within 20 days, the judgment of the district court, as thus reduced, will be affirmed; otherwise, the judgment will be reversed and the cause remanded for further proceedings.

AFFIRMED ON CONDITION.

TRESA MORAN, APPELLEE, V. MARTIN SLATTERY ET AL.,
APPELLANTS.

FILED FEBRUARY 19, 1916. No. 18614.

1. **Intoxicating Liquors: ACTION FOR DAMAGES: EVIDENCE.** Evidence examined and *held* sufficient to support the verdict.
2. ———: ———: **INSTRUCTIONS.** Instructions, when taken as a whole and construed together, *held* to have submitted the cause to the jury without prejudice to defendants.

APPEAL from the district court for Buffalo county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

T. J. Doyle, H. M. Sinclair and T. F. Hamer, for appellants.

W. D. Oldham and E. B. McDermott, contra.

MORRISSEY, C. J.

Action by plaintiff, for herself and as next friend for her minor child, against defendant Slattery, a liquor dealer,

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and Massachusetts Bonding & Insurance Company, his surety, to recover damages caused by the death of Ralph Moran, the husband of plaintiff and father of her minor child. The trial resulted in a verdict and judgment for \$5,000 for plaintiff, and defendants have appealed.

On and prior to April 17, 1913, defendant Slattery was engaged in the liquor business in Shelton, Nebraska, and the Massachusetts Bonding & Insurance Company was his surety. On that date Ralph Moran, a young farmer, rode to the town of Shelton with a neighbor, and together they called at Slattery's saloon. It is testified by Slattery that he served Moran two glasses of beer, and no other liquors of any kind that day, while Moran's companion, Lessinger, testifies that on their first visit to the saloon Moran was served with a glass of beer, and later they called again, and Moran was served to four or five glasses of beer and whiskey mixed; that they also called at another saloon, and that Moran was served either beer or ginger ale. This saloon-keeper was also sued in this action, but on the trial he was dismissed out of the case. These two farmers called at a number of business places while in the town of Shelton, and Lessinger testifies that, before they had completed their business and made ready to leave for home, Moran was under the influence of liquor. The team they were driving belonged to Lessinger and was hitched to an ordinary farm wagon. Although Moran was a mere passenger with Lessinger, he took hold of the lines and undertook to drive the team. The wagon was equipped with an ordinary spring seat set by means of "clips" on the top of the box, and Lessinger says that this seat was pulled well up to the front of the box so that their feet projected over, and that they were driving a gentle team. He says he asked Moran to turn the lines over to him, telling him that his driving made him nervous, but Moran insisted on doing the driving. After they had proceeded some distance on their way toward home, Moran fell forward from the wagon, and the team became frightened and ran. Lessinger jumped out of the wagon and escaped injury, but Moran became en-

tangled in the wagon and harness and was dragged under the wagon until the team ran against a telephone pole, bringing it to a stop. Lessinger soon arrived and removed Moran's body from underneath the wagon. Moran expired soon thereafter.

The theory of the plaintiff is that, by reason of intoxication, deceased fell from the wagon, while the defendant denies the intoxication, and attempts to account for his falling by saying that one of the "clips" which attached the seat to the box was found in the road about the place where deceased fell from the seat, and appellant reasons that if this "clip" broke, or became disconnected, it permitted the seat to suddenly turn and precipitate deceased to the ground. Of course, his fall might have been brought about in either way, but Lessinger testifies that after the accident the "clips" on the seat were in place and in good condition. Assuming that a "clip" of this character was found in the road, it does not establish that it came from the wagon in which deceased was riding. It is unnecessary to review at length the testimony showing the intoxication of deceased. There is the admission of the saloon-keeper that he furnished two drinks of beer; there is the testimony of Lessinger that he saw Moran take four or five drinks of beer and whiskey mixed. On the testimony, the jury were warranted in finding that the liquor procured at defendant's saloon contributed to his death.

Complaint is made of an instruction which told the jury that the liquors furnished by the defendant need not be the sole, or even the principal, cause of the injury. This instruction is in harmony with a long line of decisions of this court, and the exception is not well taken. *Smith v. Lorang*, 87 Neb. 537; *Wiese v. Gerndorf*, 75 Neb. 826.

But the main criticism is directed against an instruction which told the jury: "In this case you are limited to the damages, if any, sustained by plaintiffs to their means of support, and you will allow Tresa Moran, the wife, the present value of the sum, if any, that the deceased, Ralph Moran, would probably have contributed to her support

during the period of their joint expectancy of life, and also the present value of the amount, if any, said Ralph Moran, deceased, would have probably contributed to the support of Alice Moran during her dependency, but not beyond her minority, the same being less than the deceased's expectancy. In no event can you allow damages in a sum exceeding \$5,000, the amount named in the bond." Appellees point out that this instruction is too restrictive as to the measure of damages, but they have taken no cross-appeal, and it is unnecessary to discuss this phase of the instruction.

The point which appellant seeks to make is that the court did not leave the jury to determine the deceased's expectancy, but assumed it to be greater than the period of the child's minority. The child was six years of age. This instruction would assume that the expectancy is, at least, twelve years. At the time of his death, deceased was 33 years of age, and is shown to have been in excellent health. The Carlisle table of expectancy had been received in evidence. It showed his expectancy to be over 30 years. Defendant offered nothing in contradiction thereof. The court properly instructed the jury as to the weight and sufficiency of this testimony, and when the whole charge is read together, it must be said that the jury were properly instructed on the law of the case. At least, it must be said that there is no error in the instructions of which defendant may complain.

In the assignments of error, complaint is made of the amount of recovery, but this point does not seem to be further urged in the brief. Deceased was an able-bodied, industrious man, making \$80 to \$100 a month, which he was contributing to the support and maintenance of himself and his family, with a life expectancy of approximately 32 years. It is evident that the verdict is not excessive. We find no error in the record, and the judgment is

AFFIRMED.

SEDGWICK and HAMER, JJ., not sitting.

HENRIETTA OWENS, ADMINISTRATRIX, APPELLEE, v. OMAHA
& COUNCIL BLUFFS STREET RAILWAY COMPANY,
APPELLANT.

FILED FEBRUARY 19, 1916. No. 18505.

1. **Witnesses: IMPEACHMENT: COLLATERAL MATTER.** A witness cannot be cross-examined as to collateral matters not material to the issue, for the purpose of subsequently contradicting or impeaching him.
2. ———: **CROSS-EXAMINATION.** A party should not be permitted to cross-examine a witness as to matters outside of the scope of his direct examination.
3. **Instructions examined and found to contain no reversible error, and those requested were properly refused.**

APPEAL from the district court for Douglas county:
GEORGE A. DAY, JUDGE. *Affirmed.*

John L. Webster, W. J. Connell and William Ross King,
for appellant.

James C. Kinsler, contra.

BARNES, J.

Plaintiff's intestate, John S. Owens, was killed by being knocked down and partly run over by a street car at the corner of Fortieth and Hamilton streets, in the city of Omaha. Plaintiff was appointed administratrix of the estate, and brought an action for damages against the defendant, the Omaha & Council Bluffs Street Railway Company. A trial had in the district court for Douglas county resulted in a verdict for the plaintiff, and the court rendered a judgment on the verdict. The defendant has brought the case to this court by appeal.

The plaintiff alleged in her amended petition that the car was wrongfully and negligently propelled backwards against her intestate and caused him to be thrown, with great force and violence, to the pavement of the street and

across the east rail of defendant's street car track, and that he was run upon by the street car of the defendant, and was thereby so seriously bruised and injured that he instantly died as a result of the said injuries.

The defendant filed an answer, alleging, as an excuse for backing up its car, that it was necessary to do this in order to avoid a collision with the east and south-bound car, which, it alleged, had the right of way around the inside of the curve at Fortieth and Hamilton streets. It denied that Owens, when he alighted from defendant's car in the vicinity of Fortieth and Hamilton streets, started to go around the street car to the drug store at the corner of said streets, as alleged in the petition, and averred that he, when he alighted from the car, started to go to his home, in the natural course of which he would have remained on the east side of the car; that the motorman and conductor in charge of the car did not know, and did not have reason to anticipate, that Owens intended to, or would, attempt to go behind the car from which he had alighted. The answer also averred that the injuries to the defendant's intestate were the direct result of his own wilfulness, negligence and carelessness in departing from a place of safety in the street and taking hold of the rear end of the car moving backwards, and in attempting to go behind the street car. Each and all of the averments of negligence charged against defendant were also denied. The reply was a general denial of the affirmative allegations of the answer.

The facts established by the record may be briefly stated as follows: Plaintiff's intestate boarded the car by which he was killed at Twenty-fourth and Cuming streets, in the city of Omaha. The car proceeded westward on the last-named street until it reached Fortieth street, where it turned north on that street, and proceeded as far as Hamilton street, at which point the street car tracks turn west on the street last named. The car was on the east tracks and when it arrived at Hamilton street it ran into the curve about one-third of the distance, being still headed to

the north. The motorman saw a car coming east on Hamilton street to take the curve to Fortieth street. He immediately brought his car to a full stop, and Owens got off from the back steps and started around behind the car toward a drug store on the west side of the street. The motorman backed the car, and Owens was struck and knocked down, the car passing partly over him. He was instantly killed.

Defendant admitted that the crucial and important point in the case was whether Owens was on the street car track to the rear of the car at the time when it started backwards. If so, it would create a case of liability. But it alleges that the trial court erred in excluding the written statement made by the witness Preston to its claim agent, which statement was offered in evidence on Preston's cross-examination, and again in excluding the same statement when it was offered as a part of the defense. The witness testified on his direct examination that Owens stepped off the car immediately ahead of him and turned and went around behind the car; that he said "Good night" to Owens, and then started northeast; that when the car came to a stop Owens' body was under the back end of the car, and when the car was pulled off from him the doctor said he was dead. He was vigorously cross-examined by counsel for the defendant, but adhered to his statement. Defendant then offered the written statement, which differed slightly from the plaintiff's direct and cross-examination, in this: That in the written statement Preston was made to say that he heard some one "holler" when the car started back. Before the written statement was offered Preston had testified that he did not hear any one "holler" at all. The statement was objected to on the grounds that it was improper cross-examination, was irrelevant and immaterial. The objection was sustained, and was renewed when the statement was again offered in evidence as a part of the defense, and was again sustained. As we view the record, the words "when I heard this man holler" were immaterial, irrelevant and collateral, and therefore the court did not

err in excluding the statement. 5 Jones, Commentaries on Law of Evidence, sec. 827; *Johnston v. Spencer*, 51 Neb. 198; *Ferguson v. State*, 72 Neb. 350.

In 5 Jones, Commentaries on Law of Evidence, sec. 827, it is said in part: "A party may impeach the credit and contradict the testimony of an adverse witness by showing that, upon some matter which is relevant and material, he has at other times made statements which are inconsistent with his testimony. But a party cannot, by drawing out, on cross-examination, statements by a witness which are irrelevant and collateral, gain the right to contradict such testimony by showing inconsistent statements of the witness at other times."

In *Johnston v. Spencer*, *supra*, it was said: "When a witness is cross-examined on a matter collateral to the issue he cannot, as to his answer, be subsequently contradicted by the party putting the question. The test of whether a fact inquired of in cross-examination is collateral is, would the cross-examining party be entitled to prove it as a part of his case tending to establish his plea?"

This rule was followed and approved in *Ferguson v. State*, *supra*. As we view the record, it was wholly immaterial whether the witness heard some one "holler" at the time the car was started back, and the court did not err in excluding the written statement.

It is also contended that the trial court erred in sustaining objections to questions propounded to the witness Bales on cross-examination relating to what he saw and knew of the accident. It appears that Bales was a passenger riding on the inside of the car which killed Owens. He was called as a witness for the plaintiff merely for the purpose of testifying in regard to the movements of the car when it reached the corner of Fortieth and Hamilton streets. On his direct examination he was not questioned regarding the happening of the accident, nor whether he had seen Owens either before or after the accident. At the beginning of his cross-examination he testified positively that he did not see the accident at all; that he did not see

how Owens was hurt; that he did not see how he got under the car, and did not know how the accident occurred. It is contended, however, that if the defendant had been permitted to further cross-examine the witness it would have demonstrated to the court that the witness was concealing facts which he knew and could testify to concerning the accident. It can scarcely be contended that the cross-examination which defendant sought was either competent or proper cross-examination. The defendant could have made the witness its own if it had desired to do so, but, having declined to avail itself of that right, it is not in a position to complain of the ruling of the trial court.

Defendant complains of instruction No. 6, by which the court informed the jury: "And if you believe from a consideration of all the evidence in the case that the employees in charge of the car exercised such care in the movement of the car as to warnings and rate of speed as an ordinary, prudent person would have done, in view of all the conditions and surroundings there present, then you should find that the defendant was not negligent, and your verdict should be for the defendant. But if you believe from a consideration of all of the testimony that an ordinary, prudent person would have taken some precaution which the defendant's employees did not take, or would have done some act which they failed to do, or would have refrained from doing some act or thing which the employees did, then you should find that the defendant was negligent in that particular."

It is argued that under this instruction the jury might find the defendant guilty of some negligence wholly unsupported by the evidence. We think this assignment of error should not be sustained. The only evidence of negligence was that of starting the car backwards suddenly without warning while the plaintiff's intestate was attempting to cross over the track immediately behind the car. That was the issue in the case, and the jury could not have misunderstood that issue nor the effect of the evidence.

Finally, it is contended that the court erred in refusing to give instruction No. 7 which it tendered. The instruction was properly refused, because the narration of the facts set forth therein did not correspond with the testimony of defendant's own witnesses. Frank Pipal, the conductor on the car which killed Owens, testified that the car was about 50 feet long. Joseph Doyle, the motorman, testified that he backed the car about half its length. Witness Pipal stated that Owens did not fall on the pavement until the car was passing him in its backward movement to the south; that Owens then reached toward the handle at the rear platform of the car and fell down onto the pavement as the car passed on to the south. Even if it were true that Owens was on the pavement 3 feet south and 2 feet east of the car when it started south in its backward movement, the car still had over 20 feet farther to move after he fell, and when Owens' body was found, according to the testimony of Pipal, it was partly between the rails back of the hind wheels of the car. It seems perfectly clear that, if Owens had fallen on the pavement on the east side of the car as it passed him going toward the south in its backward movement, it would have been absolutely impossible for him to have been under the rear end of the car when it was brought to a stop. As we view the testimony and the conditions surrounding the accident, the instruction tendered should not have been given. We think it appears quite clear from the record that the accident occurred in the manner described by Preston, who was a wholly disinterested witness.

There appears to be no reversible error in the record, and the judgment of the district court is

AFFIRMED.

FULLER SHELLENBERGER V. STATE OF NEBRASKA.

FILED FEBRUARY 19, 1916. No. 19394.

1. **Criminal Law: APPEAL: LAW OF THE CASE: ADMISSIBILITY OF EVIDENCE.** On a second appeal to the supreme court, where the evidence is substantially the same as that presented on the first appeal, our former opinion on the question of the admissibility of the evidence is conclusive.
2. ———: **INSTRUCTIONS.** Instructions given by the trial court examined, and held without reversible error.
3. ———: **REFUSAL OF INSTRUCTIONS.** Instructions requested by defendant examined, and found to have been properly refused.

ERROR to the district court for Nemaha county: EDWARD E. GOOD, JUDGE. *Affirmed.*

John C. Watson and Max M. Cohn, for plaintiff in error.

Willis E. Reed, Attorney General, Charles S. Roe and Ernest F. Armstrong, contra.

BARNES, J.

Fuller Shellenberger was charged in an indictment with the murder of one Julian Bahaud. He pleaded not guilty, was tried in the district court for Nemaha county, and the trial resulted in a conviction. Error was prosecuted to the supreme court, where the judgment was reversed and the cause remanded to the district court for a new trial. *Shellenberger v. State*, 97 Neb. 498. On his second trial the jury again found him guilty and recommended that he should be imprisoned in the state penitentiary for life. He was sentenced accordingly, and has again prosecuted error to this court.

It is his first contention that the evidence was not sufficient to warrant a conviction. It is argued that the only evidence before the jury was an alleged confession, which the accused made, acknowledging his participation

in the commission of the crime charged in the indictment. This contention cannot be sustained, because the record contains sufficient corroboration of the confession to warrant the jury in finding the accused guilty of the crime charged. It is unnecessary to refer to the evidence of corroboration in disposing of this appeal. The confession and the evidence corroborating it are fully set out in our former opinion and will not be repeated in disposing of this contention.

Defendant next contends that the trial court erred in rulings on the admission of his confession in evidence, and argues that he was in custody when the confession was made, and therefore it was not voluntary and was not admissible. Our opinion on the former appeal contains the confession, recites the circumstances under which it was made, and the evidence of corroboration. It was there held that it was properly received in evidence, and it is sufficient to say that we adhere to our former opinion on that question.

It is further contended that, if the confession was properly received, then the whole confession should have been introduced in evidence, including all of the confessions made by defendant at different times. On the former appeal one of the grounds of reversal was that confessions of other crimes made at different times and on other occasions should have been received in evidence. The rulings of the court eliminated all questions relating to defendant's confessions, for the record shows that all of them were admitted in evidence on the last trial without limitation or restrictions of any kind.

It is also contended that the record shows that the defendant was addicted to making confessions of the crimes which the evidence shows he did not commit, and therefore no weight should have been given to his confession of the crime with which he was charged in this case.

It appears that, after the alleged confessions of other crimes were received in evidence, defendant was interrogated in relation to them, and testified that they were

not voluntary. In one instance it appears that he was arrested by the chief of police of the city of Omaha; that he was roughly and cruelly handled; was subjected to what they called the "third degree" at intervals for some three successive days, and finally, to end his torture, he made an untruthful confession. It may be said that this whole matter was before the jury, and they having found against the defendant, that question should receive no further consideration.

For the ruling of the trial court excluding a letter written by one Roberts to the county authorities of Nemaha county implicating two parties in the murder of Bahuaud, other than Gibbs and Kopf, who were implicated in the commission of the crime by defendant's confession, error is assigned. This assignment is without merit. The letter was written by one who does not appear to have any connection with the commission of the crime, and its contents are wholly immaterial, as was also the fact that a nolle was entered as to Kopf for the want of evidence to sustain a conviction as against him. We have examined the assignments of error for the exclusion of evidence, and find none in the rulings of the court.

Complaint is made of the admission of the testimony of nonexpert witnesses on the question of the sanity of the defendant, and counsel cite *State v. Thomas*, 154 N. W. (Ia.) 768, among other cases, in support of this contention. Those decisions have been examined, and we are of opinion that they are not in conflict with our rulings in such cases. Again, that question was determined by our opinion on the former appeal, where the testimony was held to have been properly admitted.

Counsel for defendant contends that the court erred in giving the fourteenth, fifteenth and sixteenth instructions upon his own motion. Those instructions related to the question of the mental condition of the defendant. It appears that the defense of insanity was relied on by the accused. That defense related to the mental condition of the defendant both at the time when the crime was committed

and when he made his confessions. The instructions of which complaint is made need not be quoted. They were correct in substance, were the usual instructions given in such cases, and have been often approved by this court. On the question of the sanity of the defendant at the time he made the confession, the court instructed the jury as follows: "The court instructs the jury that the law presumes every one to be sane and responsible for his acts until the contrary appears from the evidence; but, if there is evidence in the case tending to show insanity, then the burden of proof is upon the state to prove by the evidence, beyond a reasonable doubt, that the defendant was sane at the time he made the confession proved in this case."

It is claimed also by the defendant that the court erred in his instructions numbered 5, 6, and 7, in which the meaning of the words "aiding and abetting" were defined, and by which the jury were directed as to how they should be considered as applied to the evidence. The substance of those instructions has been often approved by the courts of this country, and, as no authorities are cited in support of this assignment, it requires no further consideration.

Counsel for defendant also contend that the court erred in refusing to give instructions numbered 9, 11, and 14 at their request. The record discloses that requests numbered 9 and 11 were, by instruction No. 7, given by the court on his own motion, and the substance of request No. 14 was contained in paragraphs numbered 11 and 12, which were given by the trial court.

An examination of the record shows that defendant had a fair trial; that the errors for which the former judgment was reversed were carefully avoided. He was accorded every right for which his counsel contended, and the jury found him guilty a second time. Under the rule in *Lucas v. State*, 78 Neb. 454, the judgment is

AFFIRMED.

FRANK E. MALM, APPELLEE, v. CHARLES STOCK ET AL.,
APPELLANTS; HANNAH STOCK ET AL., APPELLEES.

FILED FEBRUARY 19, 1916. No. 18388.

1. **Action: JOINDER: SUIT AGAINST CORPORATION.** In a suit against stockholders of an insolvent corporation by a judgment creditor of the corporation, a cause of action for conversion of corporate assets may be joined with one for the statutory liability of stockholders on account of failure to publish notice of the amount of corporate indebtedness.
2. **Corporations: INSOLVENCY: TRUST FUNDS.** Property of an insolvent corporation in the hands of its officers who have taken the same in payment of debts due them, or its proceeds, is held by them in trust for all creditors *pro rata*, including themselves.

APPEAL from the district court for Clay county: LESLIE G. HURD, JUDGE. *Reversed with directions.*

N. P. McDonald and Stiner & Boslaugh, for appellants.

Ambrose C. Epperson, for appellee Malm.

Charles H. Sloan and Paul E. Boslaugh, for appellees Stock and Elfring.

LETTON, J.

This is an action by a judgment creditor of the Sutton Mercantile Company, an insolvent corporation, to collect the indebtedness of the corporation to him, and was brought against a number of its directors and stockholders.

The first petition filed in this case sought to recover judgment upon the ground that plaintiff is a judgment creditor of the corporation; that the corporation is insolvent; that no notice has ever been published in a newspaper of the debts of the corporation as required by statute; that the defendants were stockholders in the corporation while it was in default, and that by reason of such default the defendants and each of them are personally liable for the debts of the corporation. Apparently two

amended petitions were filed which are not set forth in the transcript.

The third amended petition added to the allegations with respect to the nonpublication of notice further averments to the effect that in May, 1913, the defendant stockholders caused the corporation to go out of business and to exchange the stock of goods it owned for certain real estate which was placed in the name of defendant Ostertag; that the land has since been sold, and defendants have divided among themselves the funds received from the sale without paying the debts of the corporation. A motion was made by Ostertag to require plaintiff to separately state and number the causes of action in this petition, which was overruled. Ostertag then filed an answer, admitting the incorporation, denying a number of the other allegations, pleading that the petition does not state facts sufficient to entitle the plaintiff to the relief asked; that the first cause of action is new and different from that set forth in the original petition and is not germane thereto; that he did not participate in the transaction by which the stock of goods was exchanged for the real estate; that the title was placed in his name without his knowledge or consent; that defendant Charles Stock was president and manager, and defendant Hannah Stock, his wife, secretary of the corporation; that Stock agreed with Ostertag to pay all the debts of the corporation in consideration of the payment of \$5,000 by him to Stock; that defendant has received not to exceed \$4,000 in land, has paid \$5,000 in debts of the corporation; and that the corporation owes him \$2,500 in addition. Defendants Stock in their answer also assert that the third petition states a new and different cause of action; allege that in May, 1913, Charles Stock and Ostertag were the owners of all the capital stock of the corporation, and that Ostertag in consideration of the transfer of the land to him agreed to pay all its debts; that thereupon the corporation was dissolved; that Hannah Stock was compelled to pay certain debts of the corporation, amounting in all to about \$5,500, of which amount Ostertag

afterwards paid her \$3,885 in money from the proceeds of the land conveyed to him.

The court found that Charles Stock and Ostertag were the only stockholders in the Sutton Mercantile Company at the time it ceased business; found generally in favor of the other defendants; that the 480 acres of land was taken in exchange for the goods in the name of Stock and was by him conveyed to Ostertag; that said defendants appropriated the assets of the corporation to their own use and applied the same upon debts owing to them individually; that the property taken was equal in value to all the debts owing by the corporation to persons other than stockholders; and rendered judgment upon its findings against defendants Stock and Ostertag for \$1,367 and costs. From this judgment both defendants appeal, and have assigned specific errors.

The first complaint made by Ostertag is that the court erred in overruling his motion to require plaintiff to separately state and number the causes of action in the third amended petition and in permitting this petition to be filed. It seems clear that there were two causes of action stated in the third amended petition, but the defendant was not prejudiced by the refusal to cause the same to be separately stated and numbered. The entire petition is subdivided into numbered paragraphs, and if defendant desired to raise any issue of law or fact with reference to any of the allegations of the petition this could readily and easily have been done as the petition stood. Ostertag, therefore, suffered no prejudice by this ruling. The complaint made by both defendants as to the inclusion by amendment of a new cause of action is not well founded. The purpose of the action was to recover an indebtedness from the stockholders of the insolvent corporation. There was no change in the relief sought in the original and in the third amended petitions. An additional ground of recovery was stated, and both causes of action could properly be joined under section 7657, Rev. St. 1913.

It is apparent that the judgment of the court is based upon the conversion and appropriation of the assets of the corporation by Stock and Ostertag, who were the stockholders and officers of the corporation, and not upon the failure to publish the notice of debts, and therefore the rulings of the court complained of in relation to the latter charge were not prejudicial. As to the assignment that the judgment is not supported by the evidence, the evidence shows that the stock of goods was exchanged for 480 acres of land in Antelope county, subject to a mortgage of \$2,500. The land was conveyed to Stock. An arrangement was then made between Ostertag and Stock by which Stock conveyed the real estate to Ostertag, who in consideration for the same agreed to pay the debts of the corporation. At that time the corporation owed both Stock and Ostertag. Some time previous to this, Ostertag and Mr. and Mrs. Stock borrowed money from the Sutton State Bank for the use of the corporation, executing a promissory note for the same as individuals. Certain shares of stock belonging to the corporation were transferred to Mrs. Stock to secure her for signing this note. The bank pressed for payment of the note, and the Stocks paid this debt; afterwards Ostertag paid them \$1,885 in money and gave them notes amounting to \$3,000, upon which \$2,000 has been paid. The purchaser of the stock of goods assumed some of the debts of the company and afterwards paid them. At the time it went out of business the company owned a large number of outstanding book accounts which were subsequently collected and applied on the indebtedness. It seems to be established that at the time of the transfer of the stock of goods the corporation was insolvent and its assets were about equal in value to the debts then owing to persons other than its own officers. The officers had no right to absorb the assets for the satisfaction of their own debts and to fail and refuse to pay the debts of judgment creditors. *Ingwensen v. Edgecombe*, 42 Neb. 740; *Tillson v. Downing*, 45 Neb. 549; *Seeds Dry-Plate Co. v. Heyn Photo-Supply Co.*, 57 Neb. 214; *Sharp v. Call*, 69 Neb. 72.

Smith v. Chicago, M. & St. P. R. Co.

It is asserted that the recovery is excessive, since the plaintiff's claim must be prorated with those of other creditors. After an exhaustive discussion by counsel of the principles involved, in *National Wall Paper Co. v. Columbia Nat. Bank*, 68 Neb. 47, the rule of *Beach v. Miller*, 130 Ill. 162, that a director of an insolvent corporation who had taken property of the corporation to pay a debt to himself became a trustee for all creditors including himself, is approved. This is decisive of this point.

The judgment is therefore erroneous and is reversed, and the cause is remanded to the district court for the purpose of ascertaining the true and just amount of the indebtedness of the corporation and the *pro rata* share of creditors in the proceeds of the property appropriated, and to render a decree accordingly.

REVERSED.

CHARLES P. SMITH, APPELLEE, V. CHICAGO, MILWAUKEE &
ST. PAUL RAILWAY COMPANY, APPELLANT.

FILED FEBRUARY 19, 1916. No. 18602.

Railroads: INJURY TO PEDESTRIANS: CONTRIBUTORY NEGLIGENCE. The duty of a traveler upon a public highway approaching a railroad crossing is to exercise ordinary care. A railroad crossing is a place of danger, and if he goes thereupon without first looking and listening for the approach of a train, without a reasonable excuse therefor, and such failure to look and listen contributes to his injury, he cannot recover.

APPEAL from the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Reversed and dismissed.*

W. T. Thompson, Edwin D. Crites and F. A. Crites, for appellant.

Allen G. Fisher, Earl McDowell and William P. Rooney, contra.

LETTON, J.

This is an action to recover for personal injuries occasioned by the plaintiff being struck by an engine while attempting to cross the track of the defendant at Kennebec, South Dakota, on November 4, 1910. Judgment for plaintiff, defendant appeals.

The plaintiff at the time of the accident was 63 years of age. He had been living near Kennebec, South Dakota, and intended to move to Ardmore, in the same state. A car had been placed upon the side track in which his goods were being loaded. In substance, plaintiff testifies that at that time he was a little hard of hearing, though not as deaf as he was at the time of the trial; that he used an ear trumpet to hear at long distances, but did not use it in carrying on an ordinary conversation, and that he could hear the ringing of bells and the blowing of whistles a distance of a block away if the air was clear. As to the accident, he testified: "Well, I walked from the hotel, and turned upon the sidewalk, and I walked up that way to make the crossing over there, and when I was half way between the hotel and the railway I looked to the east and couldn't see nothing there—couldn't see any train; then I took a few steps more, so I could see by the depot to see if it was clear from the west side, and it was clear over there, and I didn't look back again, but walked right on, and I just stepped over the rail and stepped on the track, and, whiff!—like that; that is all I remember. What happened after that I couldn't tell. Up to that time I knew perfectly well what happened." He further testified that he did not hear any bell rung or whistle blown, nor see any smoke. He was wearing spectacles. His legs were both broken and he was severely and permanently injured. On cross-examination, he testified that it was between 4 and 5 o'clock P. M. when the accident happened; that it was broad daylight; that he was probably 10 or 15 yards from the track when he looked; that there was nothing to obstruct his view from the east, and that he could see a little over a city block and past the next crossing, and

could not see a half mile east because there is a slope to the east. "Q. Well, now, how many rods would you say the coast was clear so you could see if you looked thoroughly and well to the east toward where the train was coming from? A. Seventy or eighty rods, may be." He also said that it was not very cold that day, but it was windy, the wind coming from the north or northwest, but dust was not blowing; that his car was to go out upon the train that struck him, but he did not know when the train was due; that he expected a passenger train first; that he walked upon the sidewalk clear up to the south track where he was struck. He further testified that he was about half way from the hotel to the crossing when he looked; that there were no cars to obstruct his view of the main track, and nothing else, except a few people that might be on the sidewalk. The train records showed that the train arrived at 4:40 P. M., about two hours late.

A number of assignments of error are made, but the only one we think it necessary to consider is that the evidence fails to show that the defendant was guilty of negligence, and that it does show that the plaintiff was guilty of contributory negligence which was the proximate cause of the injury received. It is clearly established that the whistle was sounded at the usual place, but there is a conflict in the testimony with respect to whether the bell was ringing as the train was passing through the yards. There is sufficient testimony to support the finding that it was not rung, and we must assume this fact as established. The engineer's seat was on the north side and the fireman's station was on the south side of the engine, from which latter direction the plaintiff was approaching. The fireman testifies that he was ringing the bell, but says he did not see plaintiff until he was only a few feet from the engine and just about to step upon the track. Other witnesses for the defendant testify that plaintiff was walking rapidly as he approached the railroad. One of them was so impressed by plaintiff's apparent danger that he attempted by running toward him and calling to him to

warn him of his peril. Witnesses who were within the station (which is over 100 feet west of where plaintiff was struck) with the windows closed heard the whistle and saw the accident. Others who were to the south and southeast of the station saw that plaintiff was heading directly toward the place where he was struck. It would seem that ordinary care required the fireman to have observed what so many others saw and to take steps to guard against the threatened danger. Defendant was guilty of negligence in this respect and in failing to give proper warning of the approach of the train.

The scaled plat produced in evidence by the plaintiff shows the distances between objects and places in several instances to be different from the estimates made by witnesses, and in giving distances and direction the plat will be relied upon.

Upon the question whether, as a matter of law, plaintiff was guilty of contributory negligence sufficient to bar a recovery, the evidence shows that the plaintiff was walking rapidly, and, while his speed is not stated more definitely, it is fair to assume that he was probably moving at the rate of $3\frac{1}{2}$ miles or 4 miles an hour. Taking the testimony that the train was going from 6 to 8 miles an hour, as one of plaintiff's witnesses says, it was moving about twice as fast as was the plaintiff. The street is at less than a right angle with the track. Even if at a right angle, when plaintiff was 50 feet away from the track the train must have been 100 feet from the point of the collision, and 111.8 feet in a straight line from where he was. His view was unobstructed. If the train was running 10 or 12 miles an hour, as other witnesses say, the distance would be greater, but the train would still have been in sight. It seems a physical impossibility that he could have looked when he said he did. He must have absent-mindedly kept his eyes or his thoughts elsewhere, or he must have seen the train in ample time to have guarded against the danger.

The case is easily distinguishable from *Wallenburg v. Missouri P. R. Co.*, 86 Neb. 642, upon which plaintiff relies.

In that case there were obstructions on the right of way of the railway so that 50 feet from it an incoming train could only be seen for about 200 feet, though 7 feet from the track it could have been seen for over 500 feet. The train was coasting down grade at an estimated speed of from 35 to 50 miles an hour, and no warning either by whistle or bell was given of its approach. The plaintiff in that case looked and listened about 35 to 37 feet south of the track, and while upon the defendant's right of way. In this case, however, the evidence for the plaintiff shows that, if he had looked to the eastward at the place where he testifies he did, the train would have been in plain sight. He was approaching a dangerous place, as all railroad crossings are, and it was his duty to use ordinary care. His hearing was impaired, and there was therefore the more reason that he should exercise the sense of sight. His condition is deplorable, but we are compelled to the conclusion that he was guilty of such lack of ordinary care for his own safety that he is not entitled to recover. If he had looked at any point in his progress between the hotel and the railroad track, which according to the oral testimony is a distance of about 100 feet, but according to the plat is about 160 feet, he must inevitably have seen the train.

Under these circumstances the verdict of the jury is not supported by the evidence, and the motion of the defendant for a directed verdict should have been sustained. The judgment of the district court is reversed. Since it is apparent that no new and material facts can be produced, and the plaintiff's own testimony does not justify a recovery, the case is dismissed.

REVERSED AND DISMISSED.

NYE-SCHNEIDER-FOWLER COMPANY, APPELLANT, v. BOONE
COUNTY, APPELLEE.

FILED FEBRUARY 19, 1916. NO. 19445.

1. **Taxation: PLACE OF TAXATION: PERSONALTY.** Under section 6314, Rev. St. 1913, personal property ordinarily is required to be listed and assessed where the owner resides, but "property having local situs, like grain elevators, lumber yards or any established business, shall be listed and assessed at the place of such situs."
2. ———: ———: ———: **CREDITS.** Where a corporation operates, in several counties, stations for the purpose of selling lumber, fuel, grain and live stock, each station should be assessed as an independent business, and its net credits thereat should be ascertained by deducting the indebtedness incurred in conducting the business at such station from the gross credits thereof. Rev. St. 1913, secs. 6314, 6329.

APPEAL from the district court for Boone county: FRED-
ERICK W. BUTTON, JUDGE. *Affirmed.*

Courtright, Sidner & Lee, for appellant.

W. J. Donahue, contra.

LETTON, J.

This is an appeal from the decision of the board of equalization of Boone county with respect to the assessment for taxation of credits of the plaintiff. The district court sustained a general demurrer to the petition of plaintiff and dismissed the appeal. Plaintiff appeals.

In substance, the petition alleges that plaintiff is a Nebraska corporation with its chief office and place of business at Fremont, in Dodge county; that it is in the business of operating stations for the purpose of selling lumber, building material and fuel, and for the purpose of buying and shipping grain and live stock; that one of such stations is at Albion, in Boone county; that on the 1st day of April, 1915, it had owing to it at Albion on book accounts the sum of \$13,769.04; that the purchases of lumber, building material and fuel for all its stations are

made at the chief office in Fremont, and are paid from that office; that in order to carry on the business it is at all times necessary to purchase goods on credit and also to borrow large sums of money; that on April 1, 1915, the total amount owing to plaintiff at all of its stations was less than \$110,000, and at the same time it was indebted to persons outside of the state for merchandise in the sum of \$25,500, and for money borrowed and payable within the state for use in the business more than \$643,000; that its total indebtedness for such purposes was at least \$1,500,000; that it filed with the county assessor of Boone county a schedule of its book accounts in Boone county in the sum of \$13,769.04, and the schedule also recited that the total amount owing to plaintiff at that time was about \$102,000 as stated, and its total liabilities were more than \$1,500,000. It is also alleged that the county assessor assessed the value of its book accounts at \$5,500, and refused to make any deduction for debts; and that on appeal to the county board of equalization the assessment made by the assessor was approved.

The sections of the statutes which govern the matter are as follows:

Section 6290, Rev. St. 1913: "The term 'personal property' includes every tangible and intangible thing which is the subject of ownership and not real property as defined in the next preceding section."

Section 6291: "The word 'property' includes every kind of property, tangible or intangible, subject to ownership."

Section 6314, governing the place of listing, so far as applies, is as follows: "Personal property, except such as is required in this chapter to be listed and assessed otherwise, shall be listed and assessed in the county, precinct, township, city, village and school district where the owner resides, except that property having local situs, like grain elevators, lumber yards or any established business, shall be listed and assessed at the place of such situs."

Section 6329, provides: "The property of banks or bankers, or other companies, and merchants, except as

hereinafter specifically provided, shall be listed and taxed in the county, township, precinct, city, village and school district where the business is done."

It is elementary that "movables follow the person," in the absence of statutes providing otherwise, and that the credits of plaintiff would be assessable at the domicile of the corporation but for the statute. But the quoted sections provide otherwise, and the idea that personal property shall be listed in the locality where it is found, and not at the residence of the owner, is borne out by section 6315, as to the place of assessment of live stock or personal property connected with the farm; by section 6316, as to live stock in charge of an agistor or caretaker, or brought into the county for grazing purposes; by section 6317, as to property of manufacturers in the hands of agents; by section 6320, as to improvements on leased public lands; by section 6321, as to property in transit intended for a business. In fact, an inspection of the whole law shows the clear intention on the part of the legislature to give the people of the taxing subdivision in which personal property is situated and used for the profit of the owner the right and privilege of collecting taxes upon it, so that it may bear its proper share of the expenses of government at that place.

Plaintiff asserts that, since its general indebtedness incurred in carrying on its business at its head office and at all its branches exceeds the amount of its general credits in such places in the state, it has no net credits to be assessed. This would, undoubtedly, be true but for the provisions of section 6314: "Property having local situs, like grain elevators, lumber yards or any established business, shall be listed and assessed at the place of such situs," and of section 6329, that merchants shall be taxed where the business is done. It seems evident that the legislature intended that each lumber yard or other established business should be considered as a separate entity.

In *Hoagland v. Merrick County*, 81 Neb. 83, the court said: "Under the rule here announced (that net credits alone are taxable), it is clear that any just debts owing by Hoagland at the time the return in question was made, provided the same arose out of, or were connected with, the lumber yard at Central City, should have been set off against the items of credit."

Plaintiff must accept either one horn of the dilemma or the other. If its credits are all taxable at Fremont, then from the general credits should be deducted the general indebtedness. If the credits are taxable in Boone county, the indebtedness to be deducted must arise out of the business in that county. By returning the gross credits for taxation in Boone county, plaintiff conceded that credits are taxable locally. In this event the deductions to which such credits are subject in order to ascertain their net amounts must also grow out of the local business. In this case, without attempting to separate, or apportion, or show the amount of indebtedness which grew out of the business in Boone county, the plaintiff undertook to offset its general credits. The credits of the plaintiff in Boone county are not subject to taxation in Dodge county where its headquarters are situated. Neither are the debts which it has incurred in Dodge county, or any other county in the state, to be deducted from the credits which have accrued to the business in Boone county. Whatever debts may have been incurred in the purchase of grain, lumber, or for any other purpose legitimately connected with the conduct of the business in Boone county, are proper to be deducted from the credits in that county, but this is as far as the deduction of indebtedness may go. Since no such indebtedness was shown to the assessor, he and the county authorities were justified in refusing to make any deduction.

The judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

IN RE GUARDIANSHIP OF LOLA HILTON.

LOLA HILTON, APPELLEE, V. JOSIE NYBERG, APPELLANT.

FILED FEBRUARY 19, 1916. No. 18353.

1. **County Courts: PROBATE JURISDICTION: ERROR.** An error proceeding is available for the review of a final order made by the county court in the exercise of probate jurisdiction.
2. **Guardian and Ward: DISCHARGE OF GUARDIAN: NEW TRIAL: FRAUD.** The discharging of a guardian and the approving of a false, final account may be vacated on a petition for a new trial, where the order was based on a signed statement procured from the ward by the fraud of the guardian. Rev. St. 1913, sec. 8207.

APPEAL from the district court for Webster county:
HARRY S. DUNGAN, JUDGE. *Affirmed.*

L. H. Blackledge and Bernard McNeny, for appellant.

W. F. Button, Stiner & Boslaugh, and J. S. Gilham, contra.

ROSE, J.

In the county court for Webster county plaintiff filed a petition to obtain a new trial and to vacate an order approving the final account of, and discharging, her guardian. Rev. St. 1913, sec. 8207. A demurrer to the petition was sustained and a new trial denied. After the time for taking an appeal had expired, plaintiff filed in the district court a petition in error to review the county court's order sustaining the demurrer. Defendant interposed objections to the jurisdiction of the district court and also demurred to plaintiff's petition. Jurisdiction was entertained and the demurrer was overruled. Defendant has appealed.

The first contention of defendant is that an error proceeding is not available to review a county court's order, made in the exercise of probate jurisdiction. In principle, this point is met by a former ruling to the contrary.

Engles v. Morgenstern, 85 Neb. 51. The fair import of that decision is that an error proceeding is available for the review of a final order of the county court, made in the exercise of probate jurisdiction, notwithstanding the repeal of section 584 of the Code.

Defendant insists that the petition fails to state facts constituting grounds for setting aside the order of the county court. Plaintiff, the ward, alleged that, within five days after she reached the age of eighteen years, defendant, the guardian, conducted her to the county court and caused her to sign the following statement:

"I am fully advised of the indebtedness of \$266.95 charged against me in the report presented by my guardian of this date, and that the same is acknowledged to be just and satisfactory to me, and I hereby agree to make satisfactory settlement of the same, and ask that the said report may be allowed and the guardian discharged from further service in her said capacity as guardian."

The petition is not above criticism, but, considered as a whole, it fairly states facts showing that the statement quoted was false; that the ward, without knowledge of its import or time for investigation, signed it through the fraud of her guardian in whom she still reposed trust and confidence; that on the reverse side of the statement there appeared a purported final account of which the ward had no knowledge; that the order discharging the guardian and finding that her ward was indebted to her in the sum of \$266.95 was based on the fraudulent statement; that the items composing the simulated indebtedness were not proper charges against the ward; that the guardian did not account for rents and profits arising from the ward's lands; that no itemized account of the guardian's receipts and expenditures was ever presented to the county court; that the guardian never made a complete disclosure of the amounts received by her, and that such amounts are unknown to the ward, but will be disclosed at the trial.

Considering the petition in its entirety in connection with the duties of the guardian and the confidential relation of the parties, the allegations should not be held insufficient, when tested by a general demurrer. A statutory ground for a new trial is "fraud practiced by the successful party in obtaining the judgment or order." Rev. St. 1913, sec. 8207. The following is a general rule:

"A guardian is bound to make full disclosure to the court of his transactions, and the law requires of him the exercise of the utmost good faith. He must not conceal any material fact, nor untruthfully represent any matter to the court." *Slauter v. Favorite*, 107 Ind. 291, 298.

In *Levi v. Longini*, 82 Minn. 324, it was said: "If the written consent and receipt were obtained by fraud, they were nullities, constituting not only a wrong upon the party injured, but they were an imposition upon the probate court also."

In *Willis v. Rice*, 141 Ala. 168, the opinion contains the following pertinent observations: "It is distinctly charged that an accounting and settlement has never been had. It is true it appears from the bill that the respondent was discharged by the decree of the probate court as on a settlement, but it is shown by the bill in this connection that such discharge was procured by the respondent without an accounting and settlement, and on a paper prepared by himself, which he influenced the complainants to sign, and which in fact was untrue in its statements.

* * * There is no merit in the assignment that it is not shown how the respondent took advantage of the complainants in the matter of signing the paper acknowledging full settlement. His relation was one of greatest confidence and trust and called for the utmost of good faith. It was his duty to fully inform them of their rights in all respects. It charged that he took advantage of their youth and inexperience, and of his influence over them in getting them to sign the paper, which, they further charge, was untrue in its statements. This was sufficient. They were his wards, and from tender years had lived with him,

and grown up under his care and control; and it requires no effort to understand how easily they might be influenced by him against their interests."

The judgment of the trial court reflects the proper construction of the petition and the application of correct principles of law.

AFFIRMED.

JOSEPHINE A. KUNCL, EXECUTRIX, APPELLEE, v. ADOLPH J. KUNCL ET AL., APPELLANTS.

FILED FEBRUARY 19, 1916. No. 18627.

1. **Trusts: SUIT TO ENFORCE: PARTIES: WAIVER.** The defense that an executrix cannot maintain an action to enforce, in favor of the estate of testator, a resulting trust against a defendant to whom the legal title to realty in controversy had been conveyed is waived unless interposed by demurrer or answer. Rev. St. 1913, secs. 7666, 7668.
2. **Appeal: IMMATERIAL VARIANCE.** On appeal, a judgment will not be reversed for an immaterial variance between the pleadings and proof.
3. **Trusts: RESULTING TRUST.** Where the purchaser of realty buys it for himself and pays the purchase price with his own funds, but takes the legal title in the name of his brother for the purpose of giving the latter credit and standing in conducting a mercantile business on the premises, equity may declare a resulting trust.

APPEAL from the district court for Nuckolls county:
LESLIE G. HURD, JUDGE. *Affirmed.*

Bartos & Bartos and Hall & Bishop, for appellants.

George H. Hastings, Robert R. Hastings and Rolland F. Ireland, contra.

ROSE, J.

This is a suit to enforce a trust, the property involved being a lot and store building in the village of Lawrence, Nuckolls county. In the petition it is alleged, in sub-

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stance, that Frank J. Kuncl bought the property for himself with his own funds, but, September 22, 1908, had the legal title conveyed to Adolph J. Kuncl, defendant, a younger brother, for the purpose of giving him credit and standing in conducting a mercantile business on the premises. In the answer the alleged trustee pleaded ownership of the realty, a settlement and an accounting June 4, 1912, showing an indebtedness of \$850 owing by him, and an agreement to pay it January 1, 1913. The reply was a general denial. July 6, 1912, Frank J. Kuncl willed one-third of his property to his wife and the remainder in equal shares to his three children. He died July 19, 1912. His widow, Josephine A. Kuncl, is executrix of the duly-probated will, and sues in that capacity. Alice Kuncl, the wife of Adolph, is joined as a defendant. The trial court found the issues against defendants and required them to convey the disputed title to plaintiff. Defendants have appealed.

The judgment is assailed on the ground that the executrix, as such, has no right to maintain the suit; it being asserted by defendants that the cause of action stated, if any, exists in favor of the widow and the children individually. The point is raised for the first time on appeal. The defense that an executrix cannot maintain an action to enforce, in favor of the estate of testator, a resulting trust against a defendant to whom the legal title to realty in controversy had been conveyed is waived unless interposed by demurrer or answer. Rev. St. 1913, secs. 7666, 7668; *Gentry v. Bearss*, 82 Neb. 787.

Defendants also complain of a variance between the petition and the proof on which plaintiff relies to sustain the judgment. This point seems to be based on the proposition that plaintiff pleaded an express trust which is without support in the evidence, while the trial court enforced a resulting trust. Though the petition contains an averment that the grantee named in the deed had agreed to convey the premises to Frank J. Kuncl upon request, ultimate facts showing a resulting trust are fully

pleaded. Defendants were not misled or prejudiced by allegations applicable to an express trust. Proofs relating to the transactions were adduced on both sides. There was no jury to be confused by unnecessary averments of the petition or by immaterial testimony. The issues were determined according to the facts as understood by the presiding judge. The same course will be pursued on appeal, as directed by the Code, which declares:

“No variance between the allegation in a pleading and the proof is to be deemed material unless it have actually misled the adverse party, to his prejudice, in maintaining his action or defense upon the merits.” Rev. St. 1913, sec. 7706.

The principal question argued is the sufficiency of the evidence to justify the relief granted to plaintiff. The conclusion on appeal is the same as that reached by the trial court. The proper deduction from all of the evidence, though conflicting in some respects, is that Adolph J. Kuncl acquired the legal title to the lot in controversy as trustee for Frank, who devised it to his wife and children July 6, 1912. There is convincing proof that Frank bought the lot for himself with his own funds for \$1,000; that he afterward constructed a brick store building on the premises with his own funds at an expense exceeding \$4,000; that the deed was delivered to him; that he had it recorded; that he received and retained possession of the abstract; that he treated the lot as his own property; and that Adolph, after acquiring the legal title, recognized Frank's ownership. An analysis of the evidence would prolong the opinion without profit. The only proper inference from the relations of the parties, from their methods of doing business, from their attitude towards each other, from the transactions between them, and from the testimony of the witnesses in relation to these matters, is that the legal title was conveyed to Adolph, who was a stranger in Lawrence, for the purpose of giving him credit and standing as a merchant conduct-

ing a general store on the premises. This inference is not overcome by legal presumptions or by testimony of a different import.

When all of the circumstances are considered, proof of the settlement pleaded as a defense is not convincing. The business integrity of Frank is reflected throughout the record. He made a will July 6, 1912, in which he specifically devised the lot in controversy to his wife and children. According to the answer and to Adolph's testimony, the settlement was made June 4, 1912. An impartial examination of the record will not permit a finding that Frank then made a settlement, having the import pleaded in the answer, and a few days later devised the lot in controversy to his wife and children.

There is no error in the proceedings, and the judgment is

AFFIRMED.

**LINUS E. SOUTHWICK, APPELLEE, V. ETTA M. REYNOLDS
ET AL., APPELLEES; GREAT WESTERN COMMISSION COM-
PANY, APPELLANT.**

FILED FEBRUARY 19, 1916. No. 18629.

1. **Mortgages: FORECLOSURE: PLEADING: PRIORITY.** In a suit to foreclose an unrecorded mortgage, a cross-petitioner seeking to foreclose, as a first lien, a subsequent mortgage, duly recorded, must allege the actual consideration therefor and the payment thereof, and must also allege facts showing that he took his mortgage without notice of plaintiff's interests.
2. ———: ———: **PRIORITY: CONSIDERATION: PROOF.** In a suit to foreclose an unrecorded mortgage, where a cross-petitioner seeks to foreclose, as a first lien, a subsequent mortgage, duly recorded, the presumption that the secured note was issued for a valuable consideration is insufficient for the purpose of showing the actual consideration paid.
3. **Appeal: DENIAL OF CONTINUANCE.** Where a cross-petitioner obtains all the relief to which he is entitled under his pleadings, the denial of a continuance requested by him is not prejudicial error.

APPEAL from the district court for Dawson county:
HANSON M. GRIMES, JUDGE. *Affirmed.*

John D. Ware, for appellant.

R. M. Proudft and *John N. Dryden*, contra.

ROSE, J.

Plaintiff brought this suit to foreclose a lien on two and a half sections of land in Dawson county. Of the realty in controversy, Etta M. Reynolds had entered into contracts to purchase from the Union Pacific Railroad Company two sections, and from Jesse Good a half-section, and to pay the purchase price in instalments. Before maturity of a number of the payments, she borrowed from plaintiff \$6,500, March 6, 1908, gave him a note executed by herself and her husband, defendants, and secured the loan by assigning to the payee the land contracts mentioned. Pursuant to the terms of the assignment, plaintiff, upon default of assignors, paid the deferred instalments and taxes in full, and by deeds from the vendors acquired the legal title to the lands described. The assignment was not recorded in Dawson county. Plaintiff prays for a foreclosure of the land contracts. The proceeding amounts to a suit to foreclose a mortgage. Defendants made no defense. In a cross-petition, however, the Great Western Commission Company pleaded that defendants executed and delivered to it October 12, 1908, their promissory note for \$2,338.32 and secured it by incumbering the same lands with a mortgage recorded October 21, 1908, that the assignment of the land contracts was never recorded, and that cross-petitioner "had no knowledge of the existence of said contracts" until May 31, 1911. A lien superior to plaintiff's assignment was asserted by cross-petitioner, and there was a prayer for a foreclosure of the mortgage. The reply admitted that the note and the mortgage pleaded in the cross-petition were delivered to the payee; that the mortgage was recorded, and that plaintiff's assignment was not recorded. The trial court found that plaintiff had the

first lien, and ordered a foreclosure thereof, but granted the cross-petitioner permission to apply for the surplus, if any, after payment of plaintiff's claim from the proceeds of a foreclosure sale. Cross-petitioner has appealed.

It is argued that the pleadings of plaintiff do not state facts sufficient to constitute a cause of action to foreclose a first lien, the defect urged being a failure to plead that cross-petitioner had actual notice of the unrecorded assignment of the land contracts or unrecorded mortgage. On the record presented, the point does not seem to be well taken. Cross-petitioner sought to establish a lien prior to plaintiff's unrecorded mortgage. In this situation the burden was on it to allege and prove facts showing that it was a *bona fide* purchaser or incumbrancer for value. *Sanely v. Crapenhof*, 1 Neb. (Unof.) 8; *Dundee Realty Co. v. Leavitt*, 87 Neb. 711; *Upton v. Betts*, 59 Neb. 724. In the latter case, quoting from 2 Pomeroy, Equity Jurisprudence (3d ed.) sec. 785, it was said: "The allegations of the plea, or of the answer, so far as it relates to this defense, must include all those particulars which, as has been shown, are necessary to constitute a *bona fide* purchase. It should state the consideration, which must appear from the averment to be 'valuable' within the meaning of the rules upon that subject, and should show that it has actually been paid, and not merely secured. It should also deny notice in the fullest and clearest manner, and this denial is necessary, whether notice is charged in the complaint or not."

Plaintiff insists that the judgment of the district court should be affirmed on the ground that the cross-petition does not state facts showing that cross-petitioner is a *bona fide* purchaser or incumbrancer entitled to a lien superior to plaintiff's unrecorded mortgage or unrecorded assignment. What is urged as a fatal defect is the failure of cross-petitioner to allege a consideration and the payment thereof. Is the position thus taken tenable? Cross-petitioner's answer to the argument on this point is that the cross-petition sets out the note, which recites that, for

value received, the makers promise to pay to the Great Western Commission Company \$2,338.32. In this connection cross-petitioner invokes the statutory provision that "every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration." Rev. St. 1913, sec. 5342. This presumption would arise in a suit on the note or in an action to foreclose a mortgage securing it, but the rule seems to be otherwise where the holder of the note is claiming precedence over a prior unrecorded mortgage, as a purchaser or incumbrancer for value without notice. The present controversy over the priority of mortgages is controlled by the rule applicable to deeds. In *American Exchange Nat. Bank v. Fockler*, 49 Neb. 713, it was held that a purchaser seeking to defeat a prior unrecorded mortgage must, among other things, plead and prove "that for the property it parted with or paid a valuable consideration, what that consideration was, and that it paid or parted with such consideration before receiving notice of the mortgage."

The author of the opinion in that case quotes from *Long v. Dollarhide*, 24 Cal. 218, wherein it was said: "Had the defendant, however, shown a deed from Vaca, recorded before that of the plaintiffs, he would have failed in making out this defense; for, aside from the recitals contained in his deed, he offered no evidence showing himself a subsequent purchaser in good faith and for a valuable consideration. The burden of proving this rested upon him, and the recitals of the deed are not, as he contends, *prima facie* proof of a valuable consideration. Such recitals are but the declarations of the grantor, and it has never been held that the declarations of a vendor or assignor, made after the sale or assignment, can be received to defeat the title of the vendee or assignee. A party seeking to bring himself within the statute cannot rely upon the recitals of his deed, but must prove the payment of the purchase money *aliunde*."

These views have generally been adopted by other courts: *Nolen & Thompson v. Heirs of Gwyn*, 16 Ala. 725;

Lake v. Hancock, 38 Fla. 53; *Roseman v. Miller*, 84 Ill. 297; *Kruse v. Conklin*, 82 Kan. 358; *Shotwell v. Harrison*, 22 Mich. 410; *Richards v. Snyder & Crews*, 11 Or. 501; *Coxe v. Sartwell*, 21 Pa. St. 480; *Robertson v. McClay*, 19 Tex. Civ. App. 513.

The supreme court of the United States, in discussing the plea of purchaser in good faith, said: "The consideration must be stated, with a distinct averment that it was *bona fide* and truly paid, independently of the recital in the deed." *Boone v. Chiles*, 10 Pet. (U. S.) *177, *211.

For the reasons stated, the conclusion is that cross-petitioner did not allege facts showing that it was entitled to a lien superior to plaintiff's.

The overruling of a motion for a continuance is also challenged by cross-petitioner as erroneous. It is unnecessary to pass on the merits of this assignment, since cross-petitioner obtained all of the relief to which it was entitled under its pleadings.

AFFIRMED.

SEDGWICK, J., concurs in the conclusion.

LEE S. ESTELLE, APPELLEE, V. DAILY NEWS PUBLISHING
COMPANY ET AL., APPELLANTS.

FILED FEBRUARY 19, 1916. No. 18120.

1. **Libel; PRIVILEGED COMMUNICATIONS: CANDIDATES FOR PUBLIC OFFICES.** A public statement to the voters in regard to the qualifications and fitness of a candidate for public office made while such candidate is seeking nomination and election is a communication of qualified privilege.
2. ———: **TRUTH AS DEFENSE: BURDEN OF PROOF.** If such statement is libelous *per se* and is untrue in fact, the burden is upon the party who makes it to prove, not only that he in good faith believed the truth of the statement, but that he had evidence sufficient to justify a reasonable man in belief of its truth.

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3. ———: ———. One who publishes of a candidate for office a statement relating to the candidate's qualifications and fitness for the office is not liable in damages if the statement is true and is made with good motives and for justifiable ends, although such statement is libelous *per se*.
4. ———: PRIVILEGED COMMUNICATIONS: MALICE: BURDEN OF PROOF. A defendant is not liable for publishing privileged communications unless there was actual malice on his part, and such malice must appear before there can be a recovery. If, however, the statements published are false and libelous *per se*, malice is presumed, and the burden is upon the defendant to prove that the evidence of the truth of the statements was such as would justify him in making them, and that he did so in good faith, believing them to be true.
5. ———: ———: CANDIDATES FOR PUBLIC OFFICES. A citizen interested in an election has the right to inform other voters of any well-grounded belief which he has as to the candidate's fitness for the office.
6. ———: ———: ———. If the matters stated as facts are true, or if he has reason to believe that they are true upon the evidence that would justify reasonable men in such belief, he would not make himself liable by stating such facts to the voters.
7. ———: ———: ———. If in stating his belief as to existing facts and conditions he does so in good faith, upon sufficient ground to justify a reasonable man in such belief, he would not be liable in damages for expressing to the voters such belief.
8. ———: PLEADING: INNUENDO. The office of an innuendo in a petition for libel is to explain and apply the meaning of ambiguous or doubtful expressions in the alleged libelous publication. If it attempts to give a meaning that cannot be derived from the language used, such innuendo should be stricken out of the petition on motion.
9. ———: INSTRUCTIONS: INNUENDO. If the statement published is a statement of the belief or opinion of the party making it, and the innuendo assumes that it is a statement of fact, and the instructions of the court also assume that such statement was intended as a statement of fact, such instruction will be erroneous.

APPEAL from the district court for Dodge county:
CONRAD HOLLENBECK, JUDGE. *Reversed.*

*Brown, Baxter & Van Dusen, Elmer E. Thomas and
I. J. Dunn, for appellants.*

Mahoney & Kennedy and Dolezal & Johnson, contra.

SEDGWICK, J.

The plaintiff had held the office of judge of the district court for the fourth judicial district for about 15 years, and was a candidate for re-election. The defendant Fellman wrote an article in regard to the plaintiff's candidacy, and the defendant, the Daily News Publishing Company published the article in the Daily News, a newspaper published in Omaha. This action was begun by the plaintiff in the district court for Douglas county, and was transferred to the district court for Dodge county. The trial there resulted in a verdict for \$25,000 damages and a judgment upon the verdict, from which the defendants have prosecuted separate appeals.

The article complained of was as follows: "I am opposed to the renomination of District Judge Lee S. Estelle because I believe he is for the special interests and against the people. I am opposed to his renomination because I believe he is for the third ward crowd and against their molestation. I am opposed to his renomination because, in common with many other Omaha citizens, I regard the Erdman case a mere 'frame-up' by the third ward crowd. Erdman's real offense as viewed by them was his interruption of their police protected carnival of crime. The witnesses for the prosecution were for the most part gamblers, bartenders and gay sports who consort with them. The testimony of their more reputable witnesses was swept away by men of such standing as Dr. Rigge of Creighton University and Professor Senter of the high school of Omaha. The first jury disagreed. The second jury returned a swift verdict of guilty in one, two, three order. Mr. J. W. Miller, educational director of the Y. M. C. A., was not allowed to sit on the jury. A single man of his type would have blocked the game. Judge Estelle, in the face of these facts, gave Erdman the full limit of the law—fifteen years. I am not indifferent to the peril of myself and to my little ones if I raise my voice against the cohabitation of the gamblers and the courts in the temple of justice, but that is a secondary

matter to me. Judge Estelle ought to be defeated. I am appealing to decent republicans to defeat Estelle in the primaries Tuesday."

The defendants contend that the petition fails to state a cause of action. After their demurrers to this petition were overruled the defendants each filed separate motions to strike out parts of the petition. These motions related principally to the various innuendoes incorporated in the petition. They also complain that the court refused to give certain instructions requested by the defendants, and that certain instructions given by the court were erroneous. For the most part these criticisms in regard to the instructions depend upon the contention that the innuendoes should have been stricken from the petition, and that the petition does not state a cause of action. The publication was during the campaign for nomination in the primaries, and, as has been before stated, the plaintiff was a candidate for nomination. The defendant, Fellman was a citizen and voter of that judicial district, and was, in common with all other citizens, interested in the nomination and election. The communication was therefore what is commonly called a privileged communication, and must be construed in the light of that fact. One who publishes of a candidate for office a statement relating to the candidate's qualifications and fitness for the office is not liable in damages if the statement was true and was made with good motives and for justifiable ends, although such statement is libelous *per se*. If the statement is untrue in fact, the burden is upon the party who makes it to prove, not only that he in good faith believed the truth of the statement, but that he had evidence sufficient to justify a reasonable man in belief of its truth.

"The extent to which the cases go in relation to a candidate for a public office is that, where a person, knowing or believing that a candidate for public office is guilty of conduct affecting his fitness for the position, communicates that knowledge or belief to the electors whose support the candidate is seeking, the publisher, acting in good

faith in the discharge of his duty to the public, may make such reasonable comments and give such information as comes to him from a reliable source, and which he believes to be true, for the purpose of informing the voters of the fitness of the candidate." *Sheibley v. Huse*, 75 Neb. 811, 821.

But there is a corollary to this proposition. The principle has been stated in *Neeb v. Hope*, 111 Pa. St. 145, and quoted and adopted in *Bee Publishing Co. v. Shields*, 68 Neb. 750: "An occasion of privilege will not justify false and groundless imputations of wicked motives or of crime. The conduct of public officers is open to public criticism, and it is for the interest of society that their acts may be freely published with fitting comments and strictures. But a line must be drawn between hostile criticism upon public conduct and the imputation of bad motives, or of criminal offenses, where such motives or offenses cannot be justly and reasonably inferred from the conduct." *Farley v. McBride*, 74 Neb. 49.

A defendant is not liable for publishing privileged communications unless there was actual malice on his part, and such malice must appear before there can be a recovery. If, however, the statements of fact published are libelous *per se*, proof that such statements were untrue is sufficient to cast the burden upon the defendant to prove that the evidence of the truth of the statements was such as would justify him in making them, and that he did so in good faith, believing them to be true. As an interested citizen, it was the right of the defendant to inform the voters of any well-grounded belief which he had as to the candidate's fitness for the office. "I am opposed to the renomination of District Judge Lee S. Estelle because I believe he is for the special interests and against the people" is a statement of opinion. Even if this statement would bear the construction that he believed the candidate was so much in favor of the special interests that he would intentionally favor them in any litigation

before him, which would, of course, be misconduct in office, still, if the defendant so believed and such belief was well founded, or if he frankly stated the grounds of such belief and fairly submitted the matter to the voters, he would not be liable in damages.

The defendant's motion to strike out the innuendoes alleged in the amended petition was upon the ground that "each of the matters sought to be stricken is redundant, immaterial, and irrelevant, and for the further reason that the publication set out in plaintiff's petition is not capable of a double meaning, and is not capable of the meaning given to it by the innuendo allegations sought by this motion to be stricken from the petition," and was addressed separately to each innuendo alleged.

The first item of the publication and alleged innuendo was as follows: "I (meaning the said defendant Benjamin F. Fellman) am opposed to the renomination of District Judge Lee S. Estelle (meaning this plaintiff) because I (meaning the said defendant Benjamin F. Fellman) believe he is for the special interests (meaning thereby that, in the discharge of plaintiff's official duties as judge of said district court, plaintiff was prejudiced in favor of some litigants) and against the people (meaning thereby that, in the discharge of plaintiff's official duties as judge of the district court, this plaintiff, as such judge, exercised the functions of his office with partiality and favor contrary to law)."

In this clause of the published article the defendant stated his belief, and did not state as a fact that the plaintiff was "for the special interests and against the people." It could not be construed as intending to charge as a fact that "plaintiff was prejudiced against some litigants," or that he exercised his office as judge "with partiality and favor contrary to law."

The court instructed the jury: "If the jury believe from the evidence that said article meant what the plaintiff alleges it to mean and was false, and the plaintiff has suffered some damages thereby, then you should find in favor

of the plaintiff and against both defendants such damages as you believe from the evidence the plaintiff has sustained. The law under such a state of facts would presume that plaintiff has suffered some damage." Also, other similar instructions. By the instruction above quoted it was submitted to the jury to find whether this language, as used by the defendant, should be construed as alleged in the innuendo. The jury must have supposed that the question for them to determine was whether the language charged as a fact that the plaintiff was or had been corrupt in his office. There was properly no such question for the jury upon the statement of the publication, and the jury should have been so instructed. The innuendo in connection with the second statement of the publication is of the same character. Allowing these innuendoes to remain in the petition, and instructing the jury that they were to find whether these statements meant what the innuendoes charged they meant, was clearly erroneous. The jury should have been told that these statements were merely statements of defendant's belief, and that defendant could not be held liable for stating an honest and well-grounded belief as to the qualification and fitness of plaintiff for the office for which he was a candidate. The third statement as to how defendant regarded the "Erdman case," that is, what he believed as to that case, is followed by a statement of the facts upon which he based that belief, and some of his own conclusions drawn from those facts. If he made a true statement of facts as the foundation of his belief as to that case, he could not be held liable for expressing his reasonable belief, and conclusions derived from those facts, and submitting the question fairly to the voters.

The statement upon which he based his characterization of the "Erdman case" is: "The witnesses for the prosecution were for the most part gamblers, bartenders and gay sports who consort with them. The testimony of their more reputable witnesses was swept away by men of such standing as Dr. Rigge of Creighton University

and Professor Senter of the high school of Omaha. The first jury disagreed. The second jury returned a swift verdict of guilty in one, two, three order. Mr. J. W. Miller, educational director of the Y. M. C. A., was not allowed to sit on the jury. A single man of his type would have blocked the game." He considered the conspiracy or "frame up" of the "Erdman case" to be the work of "the third ward crowd." He thinks that, "as viewed by them," Erdman interrupted their "carnival of crime," and that was their motive in his prosecution. There is no intimation that he believed that the judge was in any way connected with these schemes of "the third ward crowd." He states as a fact the character of the witnesses for the prosecution of that case, and it seems to be conceded by both parties that that statement was substantially true. Both parties assert that the "third ward crowd" is a bad organization, as far as the public interests are concerned. Indeed, both parties by their pleadings and their evidence make this very prominent. He then says that the testimony of the witnesses for the prosecution was swept away by the testimony of certain men that he names. That might or might not be construed as a matter of opinion and judgment, rather than a statement of an issuable fact. The next statement, that the jury in that trial disagreed and that the second jury returned a "swift verdict of guilty," is not seriously controverted. He then named a juror that he says was not allowed to sit upon the jury, which is borne out by the record. The innuendo here alleged, "meaning thereby that, in sustaining a challenge of the state to said J. W. Miller on the ground of his incompetency as a juror in said case, this plaintiff corruptly exercised his judicial functions in sustaining said challenge wrongfully and unlawfully for the purpose of preventing said Erdman from having a fair trial," presented a question for the jury. That the trial judge considered the evidence in the "Erdman case" sufficient to justify a submission of the case to the jury does not of itself imply corruption. If Erd-

man was guilty of the crime as found by the jury, a sentence of the full limit of the law does not necessarily mean, and might not be understood to mean, that "plaintiff in the exercise of his judicial office wrongfully and corruptly imposed an excessive sentence upon the said Erdman." These questions should have been submitted to the jury with proper instructions. The following statement, that a "man of his type would have blocked the game," of course, is an expression of opinion. He then says: "Judge Estelle, in the face of these facts, gave Erdman the full limit of the law—fifteen years." That the sentence was 15 years was established by the record. The expression "in the face of these facts" might imply that plaintiff at the time knew all of the recited facts; that the witnesses for the prosecution were for the most part gamblers; that the testimony of their most reputable witnesses was "swept away;" that the first jury disagreed and the second jury returned a "swift verdict," and that the juror named was peremptorily challenged and necessarily therefore excluded. It was a question for the jury to determine whether the meaning was that the plaintiff knew the facts, or merely that the facts existed. The statement then concludes: "I am not indifferent to the peril of myself and to my little ones if I raise my voice against the cohabitation of the gamblers and the courts in the temple of justice, but that is a secondary matter to me. Judge Estelle ought to be defeated. I am appealing to decent republicans to defeat Estelle in the primaries Tuesday." Thus he assumes that, if he is right in his belief that the candidate is for the special interests and against the people, and is for the "third ward crowd" and against their molestation, and that the "third ward crowd framed up" the prosecution against Erdman with the result stated, then there is "cohabitation of the gamblers and the courts in the temple of justice." He appeals to decent republicans and expresses the opinion that the judge ought to be defeated.

The innuendo with the closing statement above quoted is alleged: "Meaning thereby that there existed unlawful relations and intercourse between gamblers and this plaintiff as a judge of the district court of said judicial district, and that such unlawful relations and intercourse wrongfully and corruptly influenced this plaintiff in the discharge of his judicial functions as a judge of said court." The word "cohabitation" may in some connection have a very disgraceful meaning. The jury might well regard it in this connection as an extravagant expression. The primary meaning of the classical words from which it is derived is to have (or have possession of) a common place. Webster's New International Dictionary. Its evident meaning in the connection used is that this plaintiff and gamblers associated together in the building used by the courts. Whether the defendant's meaning was, and the understanding of those who read the article would be, that "there existed unlawful relations and intercourse between gamblers and this plaintiff as a judge of the district court of said judicial district, and that such unlawful relations and intercourse wrongfully and corruptly influenced this plaintiff in the discharge of his judicial functions as a judge of said court," should have been submitted to the jury with proper instructions.

The plaintiff contends that the fact that defendant testified at the trial that he did not believe that the plaintiff was guilty of corrupt practices in his office as judge establishes that defendant did not believe that the plaintiff was "for the interests and against the people," and did not believe the other matters which he stated as his belief in the article complained of, and that therefore his statements of his belief are shown by his own evidence to have been wilful and malicious. The defendant was not asked whether he believed that the plaintiff was "for the interests" when he made that statement, nor in what sense he used that expression. The language used by him, under the familiar vernacular of the times, might mean that he believed that the plaintiff's social or business affli-

ations were with those who represented special, as distinguished from the public, interests, and that he was, or might be, unconsciously, rather than corruptly, influenced thereby. The defendant's denial upon the witnessstand that he believed the plaintiff to be corrupt in his office should be regarded as his construction of the language used by him, rather than an admission that he did not in good faith believe what he stated to the voters that he did believe.

The communication being one of privilege under the circumstances, it follows from what has been said that the question of the liability of the defendant Fellman depends upon his good faith in writing and publishing the articles complained of. If the matters stated by him as facts were true, or if he had reason to believe that they were true upon evidence that would justify reasonable men in such belief, he would not make himself liable by stating such facts to the voters. If in stating his belief as to existing facts and conditions he did so in good faith, upon sufficient ground to justify a reasonable man in such belief, he would not be liable in damages for expressing to the voters such belief. Whether the published comments made as beliefs or conclusions were honest expressions of opinion made in good faith, and not without foundation, and were such as a fair man, though entertaining extreme views, might make honestly and without malice, were questions for the jury. This principle was entirely ignored in the instructions, though defendant suggested several upon the point. By instruction 14 the jury were told unqualifiedly that, if they believe the article was false, plaintiff would be entitled to recover. This excludes entirely the idea of privilege, and of exoneration of Fellman if he believed upon good and reasonable grounds his statement to be true. Those matters should have been made plain to the jury. The questions to be submitted to the jury are: (1) Did the defendant, in the several statements of what he believed and as to what he regarded as a fact, state in good faith what he be-

lieved as to those matters and upon sufficient ground, under all the circumstances, for such belief? (2) If the fact was that the juror in the Erdman trial was challenged for cause, then would this defendant in that connection be fairly understood to charge this plaintiff with an improper motive in excusing said juror, and, if so, did the defendant act wilfully and maliciously in making the statement that the juror was not allowed to sit in the case? (3) Did the language used by defendant suggest to those who read the article that the judge, when he sentenced Erdman, knew the facts recited in the statement as to the conspiracy of the third ward crowd to convict Erdman, and would those who read the article so understand it, and, if so, did the defendant act wilfully and maliciously in stating those facts and the severity of the sentence? (4) Would the expression, "the cohabitation of the gamblers and the courts in the temple of justice," under the circumstances, and in connection with the whole article, be understood by those who read it to charge "that there existed unlawful relations and intercourse between gamblers and this plaintiff as a judge of the district court of said judicial district, and that such unlawful relations and intercourse wrongfully and corruptly influenced this plaintiff in the discharge of his judicial functions as a judge of said court," and, if so, did the defendant act wilfully and maliciously in using that expression?

Of course, the entire article must be considered as a whole, and each distinct statement construed in the light of all other statements; but this does not mean that, when a voter states his belief upon a given subject, it must be construed as a positive statement of fact because there are some matters stated as facts in the article complained of. Common sense dictates that we should ascertain what matters are stated as facts, and not treat mere statements of opinion as statements of fact. The newspaper published the article, without comment, as the views of the defendant Fellman. The instructions referred to, in the

light of the construction placed upon the innuendoes by the rulings thereon, were also erroneous as to that defendant. The defendants requested that separate verdicts be submitted to the jury, which was erroneously refused.

The judgment of the district court is reversed and the cause remanded.

REVERSED.

FAWCETT, J., concurring.

I concur in the judgment of reversal, but not in all of the reasoning upon which such reversal is based. I concur in the reversal upon two grounds:

1. The jury were not as concisely instructed as they should have been. I deem it unnecessary to set out the instructions and consider them in detail. The opinion states, succinctly I think, the issues that should have been submitted to the jury, viz.: (1) Did the defendant, in the several statements of what he believed, state what he believed as to those matters upon sufficient ground, under all the circumstances, for such belief? (2) If the fact was that the juror Miller, in the Erdman trial, was challenged for cause, would the language used by defendants in that connection be generally understood by the readers of the publication to charge plaintiff with an improper motive in excusing said juror, and, if so, did defendants act wilfully and maliciously in making and publishing the statement that such juror was not allowed to sit in the case? (3) Would the language used by defendants suggest to those who might read the article that plaintiff, when he sentenced Erdman, knew the facts recited in the article as to the conspiracy of the third ward crowd to convict Erdman, and would those who read the article so understand it, and, if so, did defendants act wilfully and maliciously in publishing those facts and in referring to the severity of the sentence in connection therewith? (4) Would the expression, "the cohabitation of the gamblers and the courts in the temple of justice," under the circumstances, and in connection with the whole

article, be understood by those who read it to charge that there existed unlawful relations and intercourse between the gamblers and plaintiff as a judge of the district court of said judicial district, and that such unlawful relations and intercourse wrongfully and corruptly influenced plaintiff in the discharge of his judicial functions as a judge of said court, and, if so, did the defendants act wilfully and maliciously in publishing the same?

2. The verdict is excessive. Punitive damages are not recoverable in this state. The measure of recovery is the actual damage sustained. The published article was designed to defeat the nomination and re-election of plaintiff. It failed in its purpose. Its failure was plaintiff's vindication. The evidence fails to show actual damages sufficient to sustain the verdict.

After a second careful examination of the record, I am impressed with the conviction that the merits of this important case can be made more clearly and satisfactorily to appear by a retrial of the issues involved.

LETTON, J., concurs.

BARNES, J., dissenting.

I cannot concur with the majority of the court, and my reasons for dissenting, briefly stated, are as follows: The libelous article set out in full in the majority opinion is construed by considering its several words and sentences separately, and in a way that, to my mind, will not bear the test of judicial investigation. The published article should be taken up as a whole, and all of its words and sentences should be construed together. There may be sentences in the article which, standing alone, possibly could not be construed as libelous and might not have caused the institution of a suit like the one we are considering. To my mind, all parts of the publication should be considered as forming the foundation for the concluding charge in the article. All related to plaintiff's manner of discharging the duties of his judicial office so as to favor "the special interests," the gamblers and dis-

reputable persons constituting the "third ward crowd," and to aid them in getting out of the way any member of the gang who should turn against them and attempt to aid in their undoing. When so taken and construed, I am of opinion that it constituted a direct charge of misconduct in office.

It must be borne in mind that what is termed in the article as the "third ward crowd" was understood and believed by the citizens of Omaha to be composed of gamblers, thieves and criminal violators of the laws of this state, together with other persons of disreputable and criminal character. In justification, defendants offered the evidence of one of the "third ward crowd" to prove that fact. The article charged that Judge Estelle was friendly to that crowd. It alleged, in substance, that the police force, acting with that element, had charged one Erdman with a criminal offense; that on the trial of that case, at which Judge Estelle presided, he had prevented one J. W. Miller from serving as a juror in the case, and if Miller had been retained on the jury he would have blocked Erdman's conviction. The article further charged that, notwithstanding the fact that the evidence was insufficient to sustain the conviction, Judge Estelle sentenced Erdman to a term of 15 years in the penitentiary, which was the extreme limit of the law for the offense charged. If this does not charge plaintiff with corruption and misconduct in office, I fail to understand the meaning of the English language.

The article in question starts out with the statement: "I am opposed to the renomination of District Judge Lee S. Estelle because I believe he is for the special interests and against the people." It concludes with the charge: "I am not indifferent to the peril of myself and to my little ones if I raise my voice against the cohabitation of the gamblers and the courts in the temple of justice, but that is a secondary matter to me. Judge Estelle ought to be defeated. I am appealing to decent republicans to defeat Estelle in the primaries Tuesday." Without further ref-

erence to the publication, I am clearly of opinion that it was libelous *per se*.

In determining whether the printed declarations were libelous, the courts will not resort to any technical construction of the language used. The publication should be read in court as it would be read elsewhere. The language itself is to be construed in its ordinary and popular sense, and the question is whether the language, when so construed, would convey, or was calculated to convey, to persons reading it, the charge of misconduct in office. *Pokrok Zapadu Publishing Co. v. Zizkovsky*, 42 Neb. 64; *World Publishing Co. v. Mullen*, 43 Neb. 126; *Barr v. Birkner*, 44 Neb. 197; *Battles v. Tyson*, 77 Neb. 563; *Thorman v. Bryngelson*, 87 Neb. 53; *Thomas v. Shea*, 90 Neb. 823; *Spencer v. Minnick*, 41 Okla. 613; *Baker v. Warner*, 231 U. S. 588.

By its answer the Daily News Publishing Company admitted the facts alleged in the first seven paragraphs of the petition, admitted publishing the article in question, and set the same out in full in its answer. It pleaded the calling and character of defendant Fellman and the part he was taking in political affairs, and alleged that the answering defendant, at the request of Fellman, published the article and believed the statements contained therein to be true, so far as appears from the ordinary import and meaning of the language used. It was alleged that defendant published the article without comment, except the caption which it prepared, viz., "Fellman Urges the Defeat of Estelle;" that it published the same without malice toward plaintiff, in the public interest, and with good motives and for justifiable ends; and that the publication was privileged. It denied that the words contained in the article had, or could have, the meaning or import alleged by plaintiff in his petition, averred that plaintiff was successful at the primary and election, and denied that he was, or has been, in any respect damaged. Defendant Fellman admitted the writing and publication of the arti-

cle in question, and alleged, in substance, that Dennison, with his "third ward crowd," had sufficient influence with public officials to afford protection to persons and corporations so that gambling, the illegal sale of liquors, disorderly houses, and other vices were rarely interfered with, when operated by followers and members of that crowd; that it was well understood in Omaha that the only way to secure the privilege of violating the law was to do so through the "third ward crowd" and its bosses, and one way to secure such privilege was to obey their commands in voting and working for their candidates at primary and general elections. Fellman's answer further alleged that for years prior to August 4, 1911, the "third ward crowd" controlled the vote of most precincts in that ward; that for years the votes of those precincts had been counted for candidates favored by them; that for years prior to the publication in question there had not been a fair, free or honest primary or election in said precincts, and in many other precincts that were under the control of the "third ward crowd;" that during plaintiff's service on the bench he had not taken any action as a citizen, or as a judge, to interfere with or lessen the political power and influence of said "third ward crowd," but, on the contrary, had rendered decisions as a judge on the bench which have aided the members of that crowd to violate the law and to terrorize those who had interfered with such violation; that the plaintiff, as a judge, had been satisfactory to the "third ward crowd;" and that because of the record made by plaintiff in the Erdman case, and in other cases which came before him as judge, and because of the protection which the "third ward crowd" had been able to give to violators of the law without interference from plaintiff, whose duty it was to interfere, defendant Fellman came to the conclusion that plaintiff was not the proper kind of a man to occupy the position of district judge.

The plaintiff's replies were, in substance, a denial of the affirmative allegations of the answers.

On the trial, plaintiff introduced evidence of his professional standing as a lawyer, of his long and satisfactory service as one of the judges of the fourth judicial district, and also as to how the article affected him when he saw it as published by the defendant the Omaha Daily News Publishing Company. The evidence showed that the effect of the published article upon plaintiff was such that he became severely ill in mind and body; that it caused him such great anguish that he was unable to perform his duties as judge of the district for about six weeks; that the result of the publication was such as to nearly cause his defeat for renomination and election; that he ran many votes behind his associates, and but for the fact that he had served the people of his district for twelve years, and was well known as an upright and conscientious judge, the publication of this article would have accomplished its purpose and he would have been defeated.

The defendants testified in their own behalf, and both stated that, when the article was written and published, neither of them believed that the plaintiff had ever been guilty of corruption or misconduct in office, and it appears that the matters charged in the publication, so far as they related to plaintiff, were untrue. This was sufficient to show malice. *Whiting v. Carpenter*, 4 Neb. (Unof.) 342; *Sheibley v. Fales*, 81 Neb. 795; *Thomas v. Shea*, *supra*. This also disposes of the appellants' claim that the article published was privileged.

The rule in some courts is that a public statement to the voters during an election campaign as to the qualifications and fitness of candidates for election to office is one of qualified privilege; that one who publishes a statement relative to a candidate's qualification and fitness for office is not liable in damages if the statement be true and is made with good motives and for justifiable ends; and decisions can be found that hold this to be true, although the statement on its face would be what might be termed libelous *per se*; but even those cases hold that, if such statement is in fact untrue, the burden is upon the one who

makes it to prove, not only that he in good faith believed the statement to be true, but that he had evidence sufficient to justify an ordinarily prudent and fair-minded man in believing in its truth. When the published statement is libelous *per se*, that is to say, is untrue when published, and the one who publishes it does not in fact believe that the one against whom the published statement is directed has been guilty of any wrongdoing, or when the person charged is a public official, and the person publishing the article does not believe that he has been guilty of any malfeasance or misfeasance in office, the doctrine of qualified privilege has no application, and the one publishing the statement is subject to the general rule of law in relation to libel. In an action for damages for libel by one holding a public office, where the defendant testifies that at the time of publishing the libelous article he did not believe that the plaintiff had ever been guilty of either malfeasance or misfeasance in office, there is no room for the application of the rule that where one publishing a statement as to another merely states his belief as to existing facts and conditions, in good faith and upon sufficient ground to justify a reasonable man in such belief, he will not be liable in damages for expressing such belief to the voters at a pending election. It is a travesty to hold that a party should be excused on a plea of good faith or upon evidence which might be thought sufficient to justify reasonable minds in believing the truth of his publication, when he himself, in fact, did not believe it was true at the time he made it. Courts should not permit such subtle distinctions to control their decisions.

What are the facts in this case? The defendant Fellman at the trial testified as follows: "Q. Did you at the time you wrote this article believe that Judge Estelle had been guilty of any corrupt acts or illegal acts in the discharge of his official duties as a judge? A. I did not. * * * Q. Did you believe that Judge Estelle had been guilty of any crime in the discharge of his official duties when you wrote this letter? A. I did not. * * *

Q. Did you have in mind or believe at the time you wrote this letter that Judge Estelle had been guilty of any misfeasance or malfeasance in office? A. I did not." Mr. Polcar, who at the time of the publication of the notice was, and for ten years prior thereto had been, managing editor of the defendant publishing company, and who at the time of the trial was the president and only resident director of the company, testified at the trial as follows: "Q. I think you testified in your direct examination that you did not believe Judge Estelle guilty of corruption in office? A. I don't believe so. Q. You don't believe he ever was guilty of any malfeasance in office? A. No, sir. Q. You don't believe he was ever guilty of any misfeasance in office? A. No, sir." This testimony, given by the two men who are responsible for the publication, entirely eliminated from the case the doctrine of qualified privilege. And, there being no evidence in the case showing that the charges made in the published notice were actually true, the defense that the notice was published from good motives and for justifiable ends, as I view the case, entirely failed. It would be an absurdity to hold that a statement which is libelous upon its face could be published for justifiable ends when it in fact was not true, and when the ones who published it did not believe it to be true. In this condition of the record, the trial court should have instructed the jury that the published statement was libelous *per se*, and should have submitted to them the one question only, viz., the amount of plaintiff's damages. If I am correct in this view of the matter, then the discussion of the innuendoes set forth in plaintiff's petition is beside the mark, and the instructions of the trial court which are set forth in the opinion of the majority and which are relied upon for reversal of the judgment, if erroneous at all, could only affect the plaintiff's rights and are most favorable to the defendant.

In *Bee Publishing Co. v. Shields*, 68 Neb. 750, in an opinion by Oldham, C., concurred in by Barnes (myself) and Pound, CC., and by Chief Justice Sullivan and Judges

Holcomb and Sedgwick, we held: "An occasion of privilege will not justify false and groundless imputations of wicked motives or of crimes against public officials in the performance of their duty. While the conduct of such officials is open to criticism, a line must be drawn between hostile criticism upon public conduct and the imputation of bad motives or of criminal offenses to officials."

In *Mertens v. Bee Publishing Co.*, 5 Neb. (Unof.) 592, we held: "The doctrine of qualified privilege applicable to communications in a newspaper regarding a candidate for public office does not extend to statements injurious to reputation or character if such statements are false in fact."

The record shows that the defendants sought to justify the charge relating to the trial and sentence of Erdman by offering testimony as to the vicious and criminal character of what they termed the "third ward crowd." As we view the evidence, it shows that no substantial fact existed which would justify the publication, and the jury were warranted in returning a verdict for the plaintiff.

That Fellman was the writer of the article is admitted; that he wrote it to be published in the Omaha Daily News, and that the editor in chief of that newspaper was vested with complete authority to say whether the article should or should not appear in the paper. He testified that Fellman brought the letter and handed it to him; that he read it and hurried it into the composing room. The purpose of Fellman in writing the letter, and of the editor in publishing it, was to defeat the plaintiff in the primary and at the election; the purpose of one was the purpose of both of the defendants. There could be no separation on the ground of qualified privilege, because neither of the defendants was privileged to write or publish the article in question. There was no ground on which to separate the defendants in determining plaintiff's damages.

That the publication failed to accomplish its purpose in this particular instance should not be urged in excuse

or mitigation. That it did come very near producing the result is true. That it did not entirely do so was doubtless because of the fact that the judge was well known in his district, where he had lived and in which he had served for many years. It will not do to lightly pass over an offense of the kind under consideration, nor to enter into any nice mathematical computation in considering the amount returned by the jury as compensation for the wrong done. The record shows that the trial was had in a district other than the one in which plaintiff resided, before a fair-minded and unprejudiced jury. The presiding judge was a man of many years of experience and well learned in the law. To my mind the instructions contain no reversible error, and the judgment of the district court should be affirmed.

MORRISSEY, C. J., concurs.

HAMER, J., dissenting.

The thing charged in the article published and on which the action for damages is based is, in substance, the co-operation of the courts and gamblers in the temple of justice, that is, in the court house. The Erdman case is referred to, and it was claimed in the article published that that case was a "frame-up," that is, a prosecution for an alleged crime without any evidence or reason upon which to found it. The conclusion must be from these statements that Judge Estelle and the gamblers tried Erdman and secured his conviction and sent him to the penitentiary when they knew he was not guilty; the judge fixing the penalty at 15 years in prison. This is official corruption, and if Judge Estelle is guilty he should be condemned by everybody and be imprisoned and disbarred, and sent to the penitentiary himself. On the other hand, if a great newspaper like the Omaha Daily News makes a charge of this kind against a judge who is a candidate for re-election, and thereby seeks to defeat him, it should know that the charge is well founded, or, at least, have substantial reason to believe that it is well founded. If

such a charge is made without reason, it is indefensible. Of course, the newspaper has a right to defend itself; but if it does the wrong complained of, it should be severely punished. As it is a corporation, there is no way to get at it, except to inflict the payment of damages upon it. If a newspaper publishes a charge of this kind without sufficient justification, it thereby is likely to defraud the voters out of an honest choice. The voter is interested in the selection of the judge. To charge that the judge is corrupt is to tell the voter that the judge is unfit for office, and that he ought to be defeated. Judge Estelle had held the office of judge of the district court in Omaha for a great many years. He desired to be nominated and re-elected, and he became a candidate. While he was nominated and re-elected, the publication of this matter probably cut down his majority very much. Many voters doubtless declined to vote for Judge Estelle and voted against him because of what they saw in the News. There may be something of a belief that, if a man becomes a candidate for any office, the public have a right to make him run the gauntlet and to stick splinters into him which are on fire. The writer remembers that Abraham Lincoln was charged when he was first a candidate for president with being a very bad man, a blackguard, a clown, a man without patriotism. He was held to be a man of low character beneath the consideration of respectable people. Nothing too opprobrious could be said of him. As a matter of fact, he was a leading lawyer in the little city in which he lived. He was a strong politician. He was a born statesman. He was patriotic to an infinite degree. He had superb courage, and with the logic of a statesman he combined that beauty of expression which is seldom found, except with poets and men who love literature in the highest degree. Ever since the day he was assassinated his memory has been eulogized by the people of the United States and the intelligence of the world. I know of no good reason why a candidate should be held up to the public gaze as a malefactor. It is time that there

should be a reform. There will never be a reform unless it commences somewhere. We have just as much right to commence here as our grandsons will have when they become old enough to be charged with the responsibility of government. When we can truthfully charge our judges with official corruption on the bench, we indicate that there is no certainty in government and that the depths of dishonesty are all about us.

In *Battles v. Tyson*, 77 Neb. 563, the article complained of read: "I want it understood that I am not running a gambling house, and that if a girl could not have decent company she has no business to have company at all; that she had three men in her room with her. * * * She was locked up in her room with three men in my house, and after they had gone I found an empty whiskey bottle on her table." In that case it was held that the meaning of the words intended by the defendant and the understanding of those who heard him should be left to the jury. The petition which charged the use of the words above set forth was held to charge a cause of action, and the judgment of the district court sustaining a demurrer to the petition was reversed.

It is contended by the appellant that the several sentences which are preliminary to the main charge of co-operation and dishonesty in the conviction of Erdman are not, taken by themselves, libelous. It is also said that they cannot be used to add a meaning to the words which make up the charge of corruption and dishonesty on the part of Estelle in the discharge of official acts belonging to the office of judge. The contention seems hypercritical. It is not fair to take up these sentences one at a time and discuss them as if they were not connected with each other, and as if they were also not connected with the charge of official corruption. In the article is the language: "I am opposed to the renomination of District Court Judge Lee S. Estelle because I believe he is for the special interests and against the people." It is said that the foregoing is not libelous. Standing by itself, there is no objection to

it. It might state a reason why the voters should not support the candidate. The mere fact that Estelle took sides in his personal belief against one party and in favor of another would not charge anything of a criminal or dishonest nature. But it should be remembered that the apparent purposes of this introductory sentence was to involve Estelle with the "third ward crowd." It is said in the article: "I am opposed to his (Estelle's) renomination because I believe he is for the third ward crowd and against their molestation." This clinches the matter. The purpose of the article is to identify Estelle with the special interests, and then to show that the special interests are the "third ward crowd," and on top of that to show that the "third ward crowd" are living in a "carnival of crime," that is, that they stand for the violation of the law. The Erdman case is described in that article as a "frame-up." It is seemingly meant by that that it is without foundation; that the real offense which Erdman had committed was not a violation of any law, but an interruption of the "third ward crowd" in the "carnival of crime" which it is claimed that they enjoyed. Estelle's co-operation with the third ward people in their alleged "frame-up" against Erdman is inseparably connected with the whole story. Each sentence describes a step in the alleged corrupt purpose and conduct of Estelle in the prosecution, conviction and sentence of Erdman.

Estelle is charged with not allowing Mr. J. W. Miller to sit on the jury. The language used is: "Mr. J. W. Miller, educational director of the Y. M. C. A., was not allowed to sit on the jury. A single man of his type would have blocked the game." The implied charge here is that Miller is an honest man, and that he would have prevented the conviction of Erdman if he had been allowed to sit as a juror, but that Estelle, being dishonest and corrupt, and being engaged in carrying out the plan of the "third ward crowd," sustained the challenge to Mr. Miller on his *voir dire* examination. Nothing could be more libelous than this. Estelle was charged with being the willing tool of

a body of men engaged in carrying out a criminal conspiracy. The article purports to deal with the trial. It was a trial where Estelle presided as judge. He is described as making a ruling in his capacity as judge. This ruling is claimed to be part of the conspiracy. It is a step toward the conviction of Erdman in a case where there is an alleged "frame-up," that is, a charge against a man on trial which is without evidence to support it. Estelle, according to the article, is made a tool of an alleged band of lawless gamblers engaged in protecting vice. The conclusion is that Estelle and the gamblers fixed up the job on Erdman and sent him to the penitentiary for 15 years.

In the opinion it is said, in substance, that the exclusion of Miller as a juror could properly be considered by the public in determining whether the judge acted honestly or corruptly. To leave the uneducated populace to determine whether the exclusion of a proposed jurymen is according to law is to rob the courts of the power which they are bound to exercise in the protection of litigants and those charged with the violation of the law. The policy of allowing men who are uneducated in the law to determine whether a proposed juror has been rightfully excluded on his *voir dire* examination may certainly well be doubted, and it should not be permitted where there is no fact upon which to base it.

The case of *Thomas v. Shca*, 90 Neb. 823, is not unlike the instant case. This court held the publication to be libelous *per se* as a matter of law. The same need to protect Thomas in that case and to punish the offender exists in this case. We should be as willing to protect a judge from a charge of dishonesty and corruption as we are to protect a lawyer. Thomas was a lawyer. In that case the libel was published a few days before the general election in 1908. The defendant was a member of the county board of Harlan county, and the plaintiff was a candidate to succeed himself as county attorney. He was the candidate of the democratic, people's independent and repub-

lican parties. The statement in the opinion is that the libel in that case is a six-column document resembling in appearance the front page of a metropolitan daily. The paper was addressed, "To the Taxpayers of Harlan County." There was in it the statement that the plaintiff would never have received the nomination of any party had the honest citizens of Harlan county known how he served them as county attorney during the past two years. There was then a description of five cases, in each of which it was charged that Thomas had neglected his duty and done something which resulted in disaster, and the reason of it was the fault of county attorney Thomas. The article said that he had gone into the five cases, which are described, and had found facts sufficient to "convince any fair man that County Attorney Thomas, in the five cases cited, gave the county, who pays him his monthly salary, the worst end of the bargain. And, as a matter of fact, Mr. Thomas could not have rendered a greater service to the opposition had he been actually retained by them and accepted their money. * * * But history chronicles successful revolutions. Should this revolution be brought about, the taxpayers of Harlan county will witness a grand exodus of jury fixers, political porch climbers and petty criminals such as this county never witnessed before in its history."

The defendant admitted in his answer that he caused the article to be printed and distributed throughout Harlan county. He also did just what was done in this case. He pleaded that the plaintiff was a candidate for the office of county attorney, and that the publication was a "privileged communication." Then there is an allegation that it was published without malice, and that the communication was made to the electors of the county in good faith for the sole purpose of advising them of the real character and qualifications of the plaintiff for the office he was then seeking. It was a little printing office that published the libel in the case of *Thomas v. Shea*. It is a big printing office that publishes the libel, if there is a libel,

in the case of *Estelle v. Omaha Daily News Publishing Co.* The principle is probably very much the same whether the newspaper is big or little, and whether the procurer of the publication is an editor or a member of the county board.

It was said of the facts in *Thomas v. Shea*, *supra*, that the evidence justified the findings that the plaintiff had not neglected his official duties to the injury of the county, and that all statements reflecting upon his integrity, motives and conduct, or upon his ability and uprightness, were false. "The entire publication was a vicious assault upon the plaintiff in his profession of attorney at law. It strikes at his means of livelihood. If the accusations are true, he is unfit to be county attorney or to act professionally for an honest client. Those who believe the charges will not employ him, if they want honest service." The logic in the *Shea* case is conclusive and unanswerable. The only trouble seems to be that we are less willing to protect Judge Estelle than we were to protect county attorney Thomas. It may be that the refinements of learning make a visible distinction between the two cases.

In *Sucha v. Sprecher*, 84 Neb. 241, the plaintiff requested the court to instruct the jury that the publication in question was libelous *per se*, and to find a verdict for the plaintiff for at least some amount. The request was refused, and the court in paragraph 4 of its own instructions, allowed the jury to determine whether the article, by giving its language a fair, ordinary and reasonable construction, would be understood by the ordinary reader as charging, or intending to charge, the plaintiff with official misconduct, or misconduct in office. The jury returned a verdict for the defendant, and the plaintiff brought the case to this court on appeal. It was stated in the argument that the language of the publication in question was susceptible of two interpretations, one of which would not render it libelous *per se*. This court said: "This being so, its nature and effect, considered in the light of the evidence,

was properly submitted to the jury." This court affirmed the judgment of the court below.

In *Spencer v. Minnick*, 41 Okla. 613, it is said: "A man cannot libel another by the publication of language, the meaning and damaging effect of which is clear to all men, and where the identity of the person meant cannot be doubted, and then escape liability through the use of a question mark."

That the language used in the instant case means dishonesty and official corruption, see the opinion of the United States supreme court in *Baker v. Warner*, 231 U. S. 588. In that case the plaintiff was the United States attorney for the District of Columbia.

In *Bee Publishing Co. v. Shields*, 68 Neb. 750, this court has rendered two instructive opinions. In the first one, which was prepared by Commissioner Oldham, it is said, quoting *Neeb v. Hope*, 111 Pa. St. 145: "An occasion of privilege will not justify false and groundless imputations of wicked motives or of crime. The conduct of public officers is open to public criticism, and it is for the interest of society that their acts may be freely published with fitting comments and strictures. But a line must be drawn between hostile criticism upon public conduct and the imputation of bad motives, or of criminal offenses, where such motives or offenses cannot be justly and reasonably inferred from the conduct." In that case it was further said: "One must not take advantage of a privileged occasion to exhibit malice toward and to unlawfully and wrongfully injure another by publishing false and defamatory matter concerning him, and that if he does so he forfeits the privilege occasioned and becomes a libeler subject to the ordinary rules of law relating thereto."

The business of a lawyer depends largely upon his reputation in the county and state in which he lives and conducts his practice. If he is a man of ill repute, his business is little and insignificant. If he is doing a good business and is a man of high standing, he will have a chance to earn money enough to support his family, to educate

his children, to start them in life, and possibly enough to enable him to travel or to devote a part of his time to literature or politics. These are the things in life which we value. To tear a lawyer's reputation down by the publication of defamatory matter is an affair of the most serious consequences. His business is destroyed. His ability to support his family and to educate his children is taken away from him, and he stands in the community as one of ill repute having no character to protect. Nearly every lawyer has an ambition to occupy the bench. If he becomes one of the judges of a court of general jurisdiction, or of an appellate court, he is flattered because his neighbors have trusted him to settle their disputes. No lawyer may have a higher ambition than the ambition to serve as a judge of one of the courts of general jurisdiction. In order to run for the position of judge, it is too much to ask of a lawyer that he shall be willing to stand up with a list of malefactors and wrongdoers. What right has a man who engages in the publication of a newspaper to rob a lawyer or a judge of all that he has that is valuable to him in a professional way? If a man steals my horse, he only takes away from me a month's labor, perhaps it is only a week's labor, but, if he takes away from me my reputation as a lawyer or a judge, he deprives me of earning a livelihood. If he does that, he costs me thousands of dollars. If he takes away from me my reputation as a judge, I can never recover from the injury. If he sets fire to my house and burns it down, I can rebuild it with the earnings of a year, but, if he takes away from me my reputation for honesty and integrity, I can never rebuild it; I am ruined for life, and my children are scandalized. This sort of thing can be done with any man who is practicing our profession. I do not care how honest or how capable he may be. A big newspaper circulates in all of the 93 counties of the state. It reaches readers in every town and village. It comes every day. If you or I should be attacked by a newspaper of this sort, we have only time in our short lives to see a small portion

of the residents of the state. The man with his big newspaper has capital behind him; he may have \$200,000 or \$300,000 behind him; with that he can encompass our destruction. If he can excuse himself in an action brought against him for damages by saying that somebody told him that we were bad men, then he can destroy anybody. He can start a lie with his henchmen, and then repeat it in his newspaper. The effect of a decision of the sort sought to be rendered in this case is to license the robber with his newspaper so that he may kill and destroy. One running for a local office in a small territory may be able to defend himself against newspaper attack because there are not so many people but that he may go and see them, but he is powerless as against a newspaper with a big circulation. The voter has a right to know that his candidate will be fairly treated, and that the voter will not be robbed or deceived. It should be an honest fight. Be careful you do not lay down a rule here which will invite and justify the destruction of your sons.

Mr. Fellman in his article speaks of peril to himself and his little ones if he raises his voice "against the cohabitation of the gamblers and the courts in the temple of justice." To draw a picture of himself and his little ones in peril because he lifts his voice against the alleged improper relations of the gamblers and the court (Judge Estelle) in the temple of justice (court-house) is one of the tricks of oratory. No judge except Estelle was spoken of or intended, and Fellman was after Estelle. A libel should be read just like any other printed page, and it is artificial construction to cut it up into alleged innuendoes, and then to profess doubts about what these mysterious innuendoes may mean. The News published the article, and it is clearly libelous, and no condition existed to make its publication one of qualified privilege. According to their own story, Fellman and the editor of the paper did not believe that Estelle was corrupt.

If it was erroneous to permit the plaintiff to prove that the directors of the defendant publishing company

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were nonresidents of the state of Nebraska; yet I am unable to see how it could injure the company in any way. Unless there was injury to the company in the admission of this testimony, it was error without prejudice. The evidence is insufficient to justify the rule laid down in the opinion and the syllabus touching the doctrine of qualified privilege. The judgment of the district court should be affirmed.

The record fails to disclose evidence justifying Fellman in writing the letter and causing it to be published, and the News Publishing Company published the letter without having evidence to justify the same. Apparently the defendant publishing company acted maliciously in publishing the letter, whatever the actual fact may be.

The judgment of the district court in favor of the plaintiff should be affirmed. I adopt the dissenting opinion of Justice Barnes, except as it is herein modified.

MARK J. WILBER, APPELLANT, v. LINCOLN AERIE, No. 147,
FRATERNAL ORDER OF EAGLES ET AL., APPELLEES.

FILED FEBRUARY 19, 1916. No. 18607.

1. **Beneficial Associations: EXPULSION OF MEMBER: POWER OF COURTS.** If a judgment of expulsion passed upon a member of a fraternal benevolent association is regular, according to the laws of the order, a court cannot disturb it.
2. ———: ———: ———. Where it was provided in the constitution of a subordinate aerie that an appeal from the decision of the grand worthy president to the grand aerie at its next annual session must be taken within 30 days from the time of the decision, and no such appeal was taken, the decision of the grand worthy president is final, and the courts have no jurisdiction to interfere.
3. ———: ———: **CIVIL ACTION.** Members of fraternal benevolent associations may lawfully agree, as a part of their scheme of organization, to submit their domestic grievances in the first instance to the internal tribunals of their order, and, having so agreed, cannot, against the protest of the association, maintain a civil action against it.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

Minor S. Bacon, for appellant.

Strode & Beghtol, contra.

Edwin J. Murfin, *amicus curiæ*.

HAMER, J.

The plaintiff and appellant brings his action to compel, by a writ of injunction mandatory in its form, his reinstatement as a member in good standing of Lincoln Aerie No. 147, Fraternal Order of Eagles, from an alleged unlawful expulsion from the said order. On the 24th day of November, 1911, the plaintiff was cited for trial on November 25, 1911. November 25, 1911, the alleged trial was had, and the trial committee reported its findings. On November 28, 1911, there was a report to the aerie against Wilber, and he was expelled. When cited to appear, Wilber claimed that he had an engagement to go to the theater, and the proceedings against him were in his absence. Wilber claims that the trial was without jurisdiction. The charge against Wilber is that he "violated section 1, art. 30 of the constitution for subordinate aeries, in that he attempted to use improper means to obtain sick benefits; that he disregarded the constitution of the Fraternal Order of Eagles in attempting to collect sick benefits by threatening the aerie with a suit at law, and threatening to resort to the courts, instead of to the regular means provided by the constitution of the order." It is also charged that Wilber, "as an officer of the aerie, appropriated funds of the aerie to his own use." It is contended by Wilber that these alleged charges do not comply with section 1, article 31 of the constitution of the order. It is said that the above purported charges do not specify time, place and circumstances, nor specify the particular manner of offense; that these are jurisdictional requirements, and that they must be strictly complied with; that the purported charges are simply conclusions,

and that they give no time and no place; that, for all that is stated, the alleged charge of "appropriating funds to his own use" may be barred by the statute of limitations.

The constitution prescribed for subordinate aeries is contained in article 31 of the constitution, which provides:

"Section 1. Whenever the worthy president or any member believes, has knowledge or information that would lead him to understand, that another member of the order has violated the constitution, ritual, or general laws of the order, it shall be his duty to make complaint against such member in writing and present the same to the worthy president, who shall report the same at the next meeting of the aerie, withholding the name of the member making such complaint. The worthy president shall immediately appoint a committee of three members, giving them the name of the complainant, and it shall be their duty to investigate such complaint, and if the committee find the complaint well grounded they shall proceed to file charges in writing against the accused, giving time, place and circumstances, and specifying the particular manner of offense with which he is charged," etc.

"Section 2. The worthy president shall, unless otherwise ordered by the aerie, thereupon appoint a trial committee of five members of the aerie who shall fix the place and time for the trial, notifying the accused under seal, and furnish him with a copy of the charges and specifications, in person, if possible; if not, by mailing to the last known address; and said trial committee shall summon witnesses under seal of the aerie, and any member so summoned must appear and give testimony upon his honor as such, as may be required by said trial committee.

"Section 3. Such committee shall, as soon as practicable, render their report in writing to the aerie, together with their verdict, which shall be either 'guilty' or 'not guilty,' and they shall accompany the same with a synopsis of the testimony taken at such trial. They shall also give the accused at least 24 hours' notice prior to the

meeting of the aerie at which they present their report that the same will be presented, thereby giving him an opportunity to interpose such objections, either in writing, personally, or by representative, as he may elect, and upon the verdict of 'guilty,' if the same be proved, and the aerie approve such verdict, it shall then proceed by a majority vote to impose the penalty provided in this constitution."

The record discloses that under section 1 the investigating committee made a finding and report that the complaint "is well grounded." They then make their charges as above recited. It is not specified when the alleged acts were committed, neither is it alleged by what means Wilber obtained the sick benefits, nor is it alleged how much he obtained.

Wilber seems to have been given 24 hours to prepare for trial. Considering the serious character of the charges made against him, it may well be questioned whether the time given in the notice was sufficient, but, in the view that we take of the matter, we need not further discuss the merits of the proceedings in the aerie. We think it is the law that the party disciplined by his lodge must appeal from any punishment or penalty imposed upon him to the last officer in the lodge or body in the lodge to whom an appeal lies before he can resort to the courts of the state, except where the liability is a simple obligation to pay money. Article 31 of the constitution for subordinate aeries provides that questions arising in a subordinate aerie shall, in the first instance, be decided by the worthy president of the aerie. Then the right of appeal is given from an adverse decision to either party. This appeal lies from the worthy president's decision to the judgment of the aerie, in which case a two-thirds vote of the members present shall be required to overrule such decision. Then from the decision of the aerie an appeal is given to the grand worthy president. In this case that appeal was taken, but no appeal was taken to the grand aerie from the decision of the grand worthy president. The provision disregarded is the one providing for an ap-

peal to the grand aerie at its next annual session. That is the last appeal provided for by the constitution. That this appeal was not taken denies to Wilber the final consideration of his case by the courts. Wilber seems to have been indifferent to his own welfare and negligent in matters of importance to himself. He failed to attend the aerie when cited to appear, and he failed to appeal to the grand aerie after he had been expelled.

Section 1, art. III of the constitution for subordinate aeries, provides:

"Section 1. Questions arising in the subordinate aerie shall in the first instance be decided by the worthy president of the aerie wherein they may occur. Either party shall have the right of appeal from adverse decisions upon such subjects in the following manner: (a) From the worthy president's decision to the judgment of the aerie, in which case a two-thirds vote of the members present shall be required to overrule such decision; (b) from the decision of the aerie to the grand worthy president; (c) from the decision of the grand worthy president to the grand aerie at its next annual session.

"Section 2. In all appeals of any nature, except from the decision of the worthy president to the judgment of the aerie, a written record of the facts in the case must be presented by the appellant within 15 days, and the respondent shall be given due and timely notice and an opportunity to present a written statement in reply, which must also be given within 15 days. After a decision has been rendered by the grand worthy president, if an appeal be not taken within 30 days, his decision shall be final."

As no appeal was taken within 30 days from the decision of the grand worthy president to the grand aerie, the decision must remain undisturbed, and we are without jurisdiction.

The following authorities support the decision which we have reached: *McAlee v. Supreme Sitting, Order of Iron Hall*, 13 Atl. (Pa.) 755; *Ocean Castle, Knights of Golden Eagle v. Smith*, 58 N. J. Law, 545; *Lafond v.*

Deems, 81 N. Y. 507; *Wood v. What Cheer Lodge, Sons of St. George*, 20 R. I. 795; *Levy v. Magnolia Lodge, I. O. O. F.*, 110 Cal. 297; *Oliver v. Hopkins*, 144 Mass. 175; *Connelly v. Masonic Mutual Benefit Ass'n*, 58 Conn. 552.

It follows that the judgment of the district court is right, and it is

AFFIRMED.

LETTON, J., not sitting.

SEDGWICK, J., concurring.

It seems that the plaintiff brought this action to compel the proper officers of the defendant to reinstate him as a member of the order. The regulations of the order give the members of the local lodge power to remove a member for cause and give such member a right to appeal to higher authority, and finally to the grand worthy president of the order. The plaintiff has not availed himself of the right of appeal to the grand worthy president, and so has not exhausted his remedy provided by the regulations of the order to which he has agreed. It seems therefore, under the authorities cited, he cannot maintain an action in the courts. The trial court so decided, and I therefore concur in sustaining the judgment.

EMMA L. PICK, APPELLEE, V. JOSEPH PICK, APPELLANT.

FILED FEBRUARY 19, 1916. No. 18619.

1. **Husband and Wife: SEPARATE MAINTENANCE.** Where a wife is compelled by the misconduct of her husband to live separate and apart from him, she is entitled to a decree for separate maintenance.
2. **Divorce: SUIT FOR MAINTENANCE: DECREE.** In an action by a wife for separate maintenance on the ground of adultery, habitual drunkenness, extreme cruelty, and failure to support, the court may grant a limited divorce from bed and board with suitable maintenance at the prayer of the wife, although it is found that all of the alleged grounds for divorce exist.

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3. **Husband and Wife: SUIT FOR MAINTENANCE: EVIDENCE.** The evidence in this case, indicated in the opinion, is found sufficient to support the decree for separate support and maintenance.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Affirmed.*

Byron G. Burbank, for appellant.

Lambert, Shotwell & Shotwell, contra.

HAMER, J.

This is an appeal from a decree of divorce rendered in the district court for Douglas county, Nebraska. The plaintiff, Emma L. Pick, filed her petition in the district court for that county on the first day of May, 1913. She alleged in her petition four grounds for divorce: That the defendant had been guilty of adultery; that he became an habitual drunkard; that he had been guilty of extreme cruelty toward the plaintiff; that he had failed to support the plaintiff. The district court found that the plaintiff "has always conducted herself toward the defendant with propriety, and as a faithful, chaste and obedient wife," and that the defendant "has been and is guilty of extreme cruelty toward the plaintiff in divers and numerous ways, and has been and is guilty of adultery and habitual drunkenness, all as charged in the petition; that each and all of said grounds, and as fully as set out and claimed in the petition, have been sustained by the evidence and so established to the extent of warranting an absolute divorce; that the defendant, Joseph Pick, is not a proper person to be granted the privilege of remarrying, and the plaintiff, Emma L. Pick, neither prays for nor desires the setting aside of the existing marriage bonds, * * * and that the plaintiff, Emma L. Pick, is entitled to a decree of separate maintenance, and that she should be allowed to live separate and apart from the defendant at his expense and charge; * * * that the plaintiff, Emma L. Pick, should be, and hereby is, granted separate maintenance from the defendant, Joseph Pick, and that

she should be, and hereby is, allowed to live separate and apart from said defendant at his expense and charge, and that the defendant should be and hereby is ordered to maintain the said plaintiff separate and apart from himself, and that no divorce be granted." The court also found: "That a reasonable allowance to the plaintiff from the defendant's estate while living separate and apart from him is the sum of \$75 per month for herself and \$25 per month to her to be expended by her for the care and support of said daughter."

The defendant has appealed. He does not object to the findings of the court as to plaintiff's grounds for a divorce, and presents two questions only. The defendant contends that the plaintiff is not entitled to a divorce from bed and board, and that she is not entitled to any general equitable relief. He also contends that the amount allowed for support of plaintiff and her child is excessive. The defendant claims that, because the evidence shows that he has been guilty of adultery and habitual drunkenness, the plaintiff thereby became entitled to an absolute divorce, and that she must have such absolute divorce whether she wants it or not, and that the court may give her nothing less.

Under section 1567, Rev. St. 1913: "A divorce from the bonds of matrimony may be decreed by the district court: (1) When adultery has been committed by any husband or wife. * * * (5) When the husband or wife shall have become an habitual drunkard."

Section 1568, Rev. St. 1913, provides: "A divorce from the bonds of matrimony or from bed and board may be decreed for the cause of extreme cruelty."

It is clear that, if the plaintiff had only charged extreme cruelty, then the court might grant the divorce from bed and board as prayed in the plaintiff's petition; but it is the contention of the defendant that, because section 1567 justifies a decree of divorce on the ground of adultery, and on the ground of habitual drunkenness, therefore, if those charges are contained in the petition and

findings, the decree must be absolute. It is the contention of the defendant that the district court has no power to grant a limited divorce for either adultery or habitual drunkenness. This brings us to the question of whether any discretion is given the district court, and whether that court is not bound within the restrictions alleged to exist. It may be said that under section 1568, Rev. St. 1913, on complaint of the wife, the husband may be compelled to provide suitable maintenance for her if she shall allege that he grossly or wantonly and cruelly refuses to provide for her. The defendant is the only party seeking to compel the granting of a decree for an absolute divorce. If an absolute divorce should be granted, then the plaintiff would be left without the support and assistance which she had a right to expect when she married the defendant. The defendant would be successful in making his own misconduct serve the purpose of freeing himself from the support of his wife and child. If the evidence is sufficient to justify a decree of divorce, then it is sufficient to justify anything less than that. Extreme cruelty is a ground for absolute divorce, or from bed and board. But, if the plaintiff has made out the right of relief upon the grounds of adultery, habitual drunkenness, and extreme cruelty, then what is the plaintiff entitled to? The question is whether the court, as a matter of public policy, should decree each of the parties to the suit entitled to an absolute divorce followed by suitable alimony to the wife.

In *McKnight v. McKnight*, 5 Neb. (Unof.) 260, this court in the body of the opinion said: "After consideration, and an examination of authorities which we have been able to find by our own research, we conclude that whether the divorce granted shall be absolute or limited rests in the sound discretion of the trial court." *Conant v. Conant*, 10 Cal. 249; *Hacker v. Hacker*, 90 Wis. 325.

In the case first above cited, the suit was brought by the wife, who was seeking an absolute divorce. She failed to get it, and appealed. On appeal she was given a decree from the bonds of matrimony. In the instant case the

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plaintiff is not seeking an absolute divorce, she is satisfied with a limited divorce that shall provide a means by which she is permitted to live separate and apart from her husband, but she and her child to be maintained by him. There is a very material distinction between the two cases. But the principle is clearly announced in the case cited, that it is for the court to determine whether the decree shall be absolute or otherwise. If this is true, it is for the court to exercise a wholesome discretion. In this case the husband is evidently desirous of getting rid of his wife as cheaply as possible. He appears to be in unusually good circumstances. He has an abundance of property from which he may support his wife and child without any inconvenience to himself. It is our duty to see that he is not relieved from the support of his wife and child. He seeks to compel the wife to obtain such a divorce as she does not desire. Evidently he does that for the purpose of securing a release to himself. When he has abundantly provided for the wife and child, then he may come to this court feeling that that fact will be considered in making such final order as ought to be made. The husband could not come to this court upon his own application and obtain a divorce from the bonds of matrimony. The guiltier he is the less he is entitled to be free from his wife. He is seeking to make his own misconduct the cause of his freedom from the bonds of matrimony. We discover no good reason why this should be permitted.

In *Hacker v. Hacker*, *supra*, it is said in the body of the opinion: "We think that the court acted wisely in granting the relief specified in the judgment appealed from. It sufficiently appears that the defendant does not desire the plaintiff to return to him, but simply that he may be saved the necessity of contributing to her support; and evidently he hopes, by this appeal, to avoid the payment of the very moderate allowance made out of his estate for the plaintiff." It will be noticed that this case gives to the trial court the discretion to exercise its judgment.

The court is invested with discretion to grant a divorce from bed and board and separate maintenance. *Goings v. Goings*, 90 Neb. 148.

In the instant case the trial court correctly found that the defendant has a substantial equitable interest in the York Foundry & Engine Works and the American Supply Company, two corporations doing business at the city of York, in York county, Nebraska. It appears that the legal title to said property has been kept and maintained by the father in his own name because of the instability of the defendant in personal and business affairs, and because of his habits of intoxication, but that the said legal title is held by the father in trust for the son, and that the son is permitted to own the property and enjoy its use the same as if he himself held the legal title and exclusive possession.

The plaintiff testified that the father did not put the defendant on a salary; that he used whatever money he wanted, and that he always called the business his business, and that he spent more than \$4,000 a year; that he took money from the York business and invested it in a home, and that he also invested money from the York business in other property, taking the title thereto, and that he had no other source of income; that he placed \$4,000 in the building and loan to his account; and that he bought other property from the York business, and that he paid \$15,000 or \$16,000 for a farm which he purchased with proceeds from the York business, and that he took the title to the farm in his own name; that he had cleared as much as \$11,000 in one year in the York business; that the father, Charles Pick, never received a dollar from the York business, and that he never paid any attention to the business or to the books of the concern, and that the son made extensive improvements to the plant without consulting Charles Pick, the father; that Charles Pick, the father, told the plaintiff that he had not conveyed the legal title to the son because he wanted to protect the interest of the plaintiff and her daughter in the

property. This testimony is corroborated by the testimony of several other witnesses, so that there can be no doubt of the fact that the defendant is the actual owner of the property, and that he is in the exclusive possession of it.

In 1 R. C. L., p. 903, sec. 50, the learned editors observe: "A woman who is compelled, through her husband's fault, to live apart from him may, in many jurisdictions, maintain a suit for separate maintenance or permanent alimony, without being forced to seek a divorce. In such a proceeding the court has power to award alimony *pendente lite*, even though the statute contains no express grant of authority to make such an order except in the case of a suit for divorce."

The courts of equity in this state have inherent power to decree separate maintenance and support where such seems appropriate. In *Earle v. Earle*, 27 Neb. 277, it is said in the body of the opinion: "While the statute books of this and other states amply provide for the granting of divorces in meritorious cases, yet we do not apprehend that it is the purpose of the law to compel a wife, when the aggrieved party, to resort to this proceeding, and thus liberate her husband from all obligations to her, in order that the rights which the law gives her, by reason of her marital relations with her husband, may be enforced."

In *Galland v. Galland*, 38 Cal. 265, it is said: "The power to decree alimony falls within the general powers of a court of equity, and exists independent of statutory authority. And, in the exercise of this original and inherent power, a court of equity will, in a proper case, decree alimony to the wife, in an action which has no reference to a divorce or separation."

In *Garland v. Garland*, 50 Miss. 694, it is said: "Courts of equity in America will always interpose to redress wrongs when the complainant is without full, adequate and complete remedy at law."

In *Graves v. Graves*, 36 Ia. 310, it is said in the syllabus: "A court of equity will entertain an action brought for alimony alone, and will grant the same, though no divorce

or other relief is sought, where the wife is separated from the husband on account of conduct on his part justifying the separation."

In *Bueter v. Bueter*, 1 S. Dak. 94, it is said in the syllabus: "In this state a wife, justified by her husband's misconduct toward her in living separate from him, may maintain an independent action against him for her support, without regard to the question of divorce."

In *Baier v. Baier*, 91 Minn. 165, it is said in the syllabus: "A wife who is living apart from her husband for a cause legally justifying her may maintain, independent of an action for a divorce, an equitable action against him for her separate support."

In *State v. Superior Court*, 85 Wash. 72, it is said in the body of the opinion: "It is the settled law of this state that an action for separate maintenance may be maintained by a wife, though we have no statute upon that subject."

In this case the husband by his misconduct entitles the wife to separate maintenance, and it is for the court to say whether it will grant a divorce from the bonds of matrimony, or decline. We decline.

The judgment of the district court is

AFFIRMED.

LETTON, J., not sitting.

FAWCETT, J., concurring separately.

I cannot concede that in divorce cases the courts are invested with full equitable powers. The marriage relation cannot be severed, interrupted or abridged except as expressly provided by statute. No divorce can be granted, either absolute or from bed and board, except for the causes and in the forum provided by statute. Section 1567, Rev. St. 1913, sets forth the grounds for which an absolute divorce may be granted. Section 1568 sets forth the grounds for which either an absolute divorce or one from bed and board may be granted. I seriously question the power of the court to grant a divorce from bed and board upon any of the grounds

set forth in section 1567, but freely concede that it may, in its sound discretion, grant a divorce, either absolute or from bed and board, for the causes set forth in section 1568. The petition of plaintiff alleges grounds appearing in both sections, but the prayer of her petition clearly asks for relief under section 1568. As her petition alleges grounds which would entitle her to relief under that section, and the proof is sufficient to sustain those allegations, I concur in the judgment of affirmance.

LAURENCE FORREST, APPELLEE, v. EMIL KOEHN ET AL.,
APPELLANTS.

FILED MARCH 4, 1916. No. 18569.

1. **Intoxicating Liquors: LIABILITY OF SALOON-KEEPER.** A licensed saloon-keeper is liable to one who becomes intoxicated by drinking liquors furnished by the saloon-keeper and, while in a state of intoxication, suffers injury.
2. **Instructions examined and found free from error.**

APPEAL from the district court for Madison county:
ANSON A. WELCH, JUDGE. *Affirmed.*

Willis E. Reed, Jack Koenigstein, T. J. Doyle and Charles G. McDonald, for appellants.

Allen & Dowling and Barnhart & Stewart, contra.

MORRISSEY, C. J.

This action was brought against five saloon-keepers, and the sureties upon their respective bonds, to recover for personal injuries suffered by plaintiff while in a state of intoxication. The verdict went in favor of two of the saloon-keepers and their sureties and against the other saloon-keepers and their respective sureties. The defendants against whom there was verdict and judgment have appealed.

Plaintiff was 28 years of age and a common laborer earning from \$2.50 to \$3 a day. He became intoxicated, and, while in this condition, went upon the railroad tracks

and in some way which is not explained was drawn under a passing train. His left arm was so crushed and mangled that it became necessary to amputate the same. One of his feet was also crushed and three of his toes cut off. There is evidence indicating that he threw himself in front of the train with suicidal intent; but this, we think, is immaterial. If the liquor furnished by defendants caused the intoxication and overthrew his reason, defendants' liability would not be lessened because he sought to destroy himself.

One of the defendant sureties, by separate answer, denied liability because it was also surety on the bond of another saloon-keeper and a judgment of \$5,000 had been entered against it, for the same license year, in another action which had just been tried in the district court for Madison county. Plaintiff demurred to this and the demurrer was sustained. After assigning the ruling on this demurrer as error and discussing it at some length, appellant says, "but, inasmuch as the verdict is less than \$5,000, we do not urge it in this case." This will be treated as a waiver of the assignment and it will not be further discussed.

The court in stating the issues to the jury literally copied the pleadings. Complaint is made of this form of stating the issues, and we are cited to *Hutchinson v. Western Bridge & Construction Co.*, 97 Neb. 439, where the court said: "We are again moved to criticise the practice of copying the pleadings in full as a method of stating the issues to the jury. * * * A clear, concise and terse statement of the issues is much to be preferred to the involved legal verbiage often found in formal pleadings, and is much more easily apprehended."

Appellants argue that, by copying the language of the petition, the court fixed the term of expectancy as alleged in the petition and withdrew that question from the jury. We think, however, that the instruction is not susceptible of that construction. The prejudice, if any, is not sufficient to call for a reversal, but the language used in

Hutchinson v. Western Bridge & Construction Co., *supra*, is quoted because it points out a better practice than that followed by the trial court.

Complaint is made of other instructions, phrases and paragraphs being singled out for criticism; but, when the whole charge is read together, it does not seem subject to the criticisms made. Taken as a whole, the instructions are plain, explicit, and so framed that a man of common knowledge and ordinary understanding can have no difficulty in understanding them. It is a well-settled rule that instructions are to be considered together, and if when so considered they properly state the law, they are sufficient.

Appellants urge with much force and logic that the petition does not state a cause of action, and that the court erred in overruling the demurrer *ore tenus*. The point sought to be made is that section 3859, Rev. St. 1913, under which the action was brought, was not designed to give plaintiff a right of action against the defendants; that the party who procures liquor from a liquor dealer, becomes intoxicated, and suffers injury, has no cause of action for the injury sustained. This section was first before the court for construction in *Buckmaster v. McElroy*, 20 Neb. 557, and it was held that where the plaintiff became intoxicated on liquor furnished by a licensed dealer, and, because of his intoxication, suffered the loss of his feet, the dealer was liable. The instant case is closely analogous; but counsel undertake to show that the reasoning of the court does not sustain the opinion, which was by a divided court. We do not deem it necessary to supplement the reasoning in that case. That was the interpretation placed on this section of the statute at the time the defendant saloon-keepers were licensed. Defendants executed the bonds with knowledge of the interpretation placed upon this section by the court, and are not in position to insist that it is a harsh rule.

The record is found free from error, and the judgment is

AFFIRMED.

SEDGWICK, J., not sitting.

PAUL PETERSON, APPELLEE, v. HARTFORD FIRE INSURANCE
COMPANY, APPELLANT.

FILED MARCH 4, 1916. No. 18743.

Compromise and Settlement: FRAUD: EVIDENCE. Evidence examined, its substance set out in the opinion, and held to support the verdict.

APPEAL from the district court for Washington county :
ALEXANDER C. TROUP, JUDGE. *Affirmed.*

Gurley, Woodrough & Fitch, for appellant.

Herman Aye, A. W. Jefferis and F. S. Howell, contra.

MORRISSEY, C. J.

This is an action to recover on a settlement of a liability created by a policy of fire insurance. From a verdict and judgment in favor of plaintiff, defendant appeals. This is the second time the case has been in this court. The former opinion is found in 93 Neb. 448; the opinion being controlled by its companion case, *Springfield Fire & Marine Ins. Co. v. Peterson*, 93 Neb. 446. The facts are sufficiently stated in the two cases mentioned and will not be repeated here. On the retrial of the case, defendant filed an amended answer alleging that the agreement of compromise and settlement was fraudulently procured, and the court instructed the jury to the effect that the question to be determined was: Did the defendant enter into the adjustment and compromise settlement by reason of any fraudulent representation or deception practiced by plaintiff? No complaint is made of this instruction, and we will assume that this issue was practically the only one on which the jury passed. Defendant contends that the adjustment and settlement on which recovery is had was so clearly shown to have been obtained by fraud that there is no room for an honest difference of opinion, and therefore the verdict and judgment are not sustained by sufficient evidence. This is the only point urged in the brief, and will be the only question considered.

There is now no contention that there was any fraud in procuring the insurance, or that the property was over-insured. Neither is there any suggestion that there is any suspicious circumstance connected with the fire. During the fire the linotype machine was drenched with water and became covered with debris. The roof was burned off the building, and plaster and cinders literally covered the machine. The timbers on which the machine rested were burned to such an extent that plaintiff and defendant's adjuster thought it unsafe to go about the machine very much for fear the timbers might give way, and they, together with the machine, be precipitated into the basement. The adjuster did not regard himself as competent to pass on the damage, and between them it was arranged to have an experienced linotype man from Omaha look the property over. At the suggestion of plaintiff, a man named Bush, who had helped to install the machine, was procured, and he, together with plaintiff, looked the machine over; but, for the same reasons that deterred the adjuster and plaintiff from making a careful examination, he refrained from removing the debris from the machine, but took a long distance view of it, and then made a report in writing stating: "Upon inspection I found the following parts necessary to equip the machine so as to put it in running order." He then gave a list of parts by taking a catalogue of parts, listing them, with the prices given in the catalogue. This report showed the total amount required to be approximately \$1,900. Bush read from this catalogue while Peterson did the writing, and together this statement was prepared. The claim is now made that this report of loss was worked out by Peterson and Bush for the purpose of defrauding defendant; that it is untrue; that defendant was deceived thereby; and therefore a recovery cannot be had thereon.

Plaintiff testified that, after this report had been made to the adjuster, he had a conversation with the adjuster, that they went over the matter together, and the adjuster said that the statement made by Bush was not a state-

ment of the loss, and did not purport to be the loss at all, but that it was a statement of what it would cost to "rebuild the machine," while defendant was liable only for the actual loss, and he made an offer to pay the amount on which settlement was finally made. There is a letter in the record from the adjuster which fully corroborates the testimony of the plaintiff. It says: "We are unable to understand from what Mr. Bush figured in making his estimate, as to our minds it is entirely out of proportion with the actual damage sustained by fire, and we must say to you frankly that we cannot consider this estimate as a basis for settlement." The correspondence discloses that after Bush made his report defendant had arranged for an expert from the factory making the linotype machine to inspect the loss. And this inspection would have been made had not plaintiff accepted defendant's offer of settlement. It is quite evident that neither plaintiff nor defendant's adjuster removed the debris from the machine or made as careful an examination as they ought to have made before undertaking to adjust the loss. No doubt, each honestly believed that the machine was greatly damaged. It subsequently developed that the debris which fell on the machine had protected it from the fire and that it had suffered very little damage.

Defendant, in its brief, lays much stress upon the language of the report made by Bush and the fact that it was prepared in the office of plaintiff and to some extent, at least, under his direction. But the subsequent conduct of defendant's adjuster and his correspondence fairly show that he did not rely upon this statement, and we think it may be reasonably inferred that, having seen the property, he relied on his own judgment and thought at the time he was making an advantageous settlement. Here we have two parties dealing at arm's length, each seeking to make the best settlement attainable. They do make a settlement. Afterwards it is discovered that one has gained an advantage thereby, but for this reason alone we cannot set their agreement aside. If, when the debris was

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removed and the machine examined, it were found that the damage exceeded the amount of the settlement, it is not unlikely defendant would have taken advantage of the agreement made and would have enforced it. The verdict of the jury has ample support in the evidence, and the judgment is

AFFIRMED.

SEDGWICK, J., not sitting.

**CHARLES B. WRIGHT ET AL., APPELLEES, V. LIZZIE
PFRIMMER, APPELLANT.**

FILED MARCH 4, 1916. No. 18363.

1. **Deeds: COVENANTS: RIGHT TO ENFORCE.** Where the owner of a tract of land subdivides it into lots and makes public a general plan of improvement or development and executes deeds to the lots with uniform restrictive covenants pursuant to the general plan, purchasers may enforce such covenants against each other.
2. ———: ———: ———. Purchasers of lots cannot enforce against each other restrictive covenants imposed upon their respective lots in a deed to their common grantor, when such covenants were not part of a general plan of improvement, but were imposed for the benefit of other land retained by the original owner.
3. ———: ———: **ENFORCEMENT: BURDEN OF PROOF.** In a suit by a prior grantee to enforce a restrictive covenant in the deed of a subsequent grantee from the common grantor, the burden is on plaintiff to prove that such covenant was intended for the benefit of his land.

**APPEAL from the district court for Douglas county:
HOWARD KENNEDY, JUDGE. *Reversed and dismissed.***

Mahoney & Kennedy, for appellant.

Warren Switzler and H. W. Morrow, contra.

BARNES, J.

This is a suit to enjoin defendant from using a residence lot in Omaha for rooming and boarding purposes in alleged violation of restrictive covenants in her deed. From a decree granting an injunction, she has appealed.

Plaintiffs are not parties to the conveyance through which defendant acquired title, and their right to an injunction is challenged on the ground that the restrictive covenants do not inure to their benefit. The covenants in question are as follows:

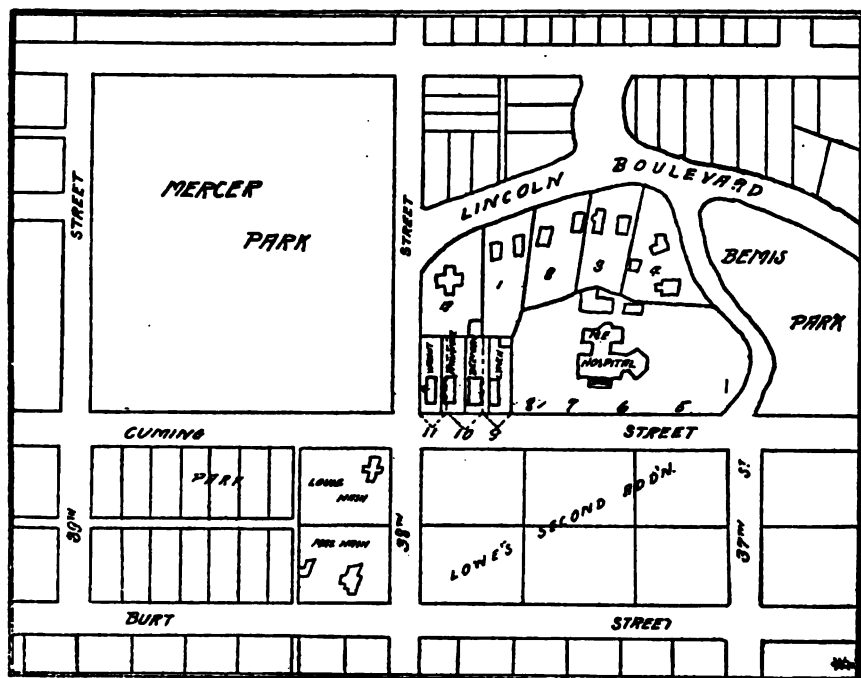
"Subject, however, to * * * the following restrictions and agreements which shall be considered and construed as covenants running with the land for a period of 25 years from the 17th day of May, A. D. 1909:

"(1) That for 25 years from the above date, said property shall be used for residence purposes exclusively and there shall only be erected thereon one separate private residence with the necessary stables and other outhouses in connection therewith, the residence herein specified not to include any apartment house, flat or connected house of any description.

"(2) That any residence erected on said property shall be fronted on Cuming street and the front line thereof shall be placed as nearly as practicable in line with the residence now located on west 50 feet of lot 11, block 12, Bemis Park.

"(3) That any residence erected on said property shall cost not less than \$3,500."

The accompanying map is an aid in understanding the facts:



Defendant owns a lot composed of parts of lots 10 and 11, in block 12, Bemis Park, an addition to Omaha. Lots 9, 10 and 11 were originally owned jointly by Mrs. E. W. Nash and her son-in-law, L. F. Crofoot, and were afterwards subdivided into four lots. The grounds of the Methodist Hospital, east of these lots, had been purchased at an earlier date from Mr. Nash without restrictions. Diagonally across the intersection of Cuming and Thirty-eighth streets, Mrs. Nash owned a tract of land having a frontage of 150 feet on Cuming street, where she had resided for many years. Of the four lots mentioned, the one on the east was conveyed to plaintiff Wright on June 27, 1907. The lot adjoining the hospital grounds was conveyed to Frederick L. Smith, December 11, 1906. Sub-

sequently, Mrs. Nash conveyed all of her real estate, for the purpose of management, to the C. B. Nash Company, in which she was the principal stockholder. May 17, 1909, George W. Garloch purchased the other two lots subject to the restrictions contained in defendant's deed, and, after building a house on each, sold the lot adjoining the Wright property to defendant March 15, 1909, and the other to plaintiff Beeman March 5, 1910.

The covenants in the Smith deed were as follows:

"Subject, however, to the following covenants which are hereby expressly made to grantors, their heirs, executors, administrators and assigns, by Frederick L. Smith, for and as binding upon himself, his heirs, executors, administrators and assigns, to wit: (1) That said property shall be used for residence purposes only; (2) that any residence erected thereon shall cost not less than twenty-five hundred dollars (\$2,500) and that the front line of same shall stand at least thirty-five (35) feet from the south line of said property; (3) that these covenants shall be considered and construed as covenants running with the land."

The covenants in the Wright deed were as follows:

"Subject to the following restrictions and agreements which shall be considered and construed as covenants running with the land:

"(1) That said property shall be used only for the purpose of erecting thereon one separate, detached private residence. The term residence as herein used shall not include an apartment house, brick flats, or connected or adjoining houses of any description.

"(2) That said residence shall cost, when completed, not less than \$4,500.

"(3) That said residence, when erected, shall front south on Cuming street, and the front line thereof shall stand at least thirty feet from the south line of said property."

May the restrictive covenants in defendant's deed be enforced at the suit of plaintiffs, who are not parties to

that deed? Authorities on this subject are collected in 37 L. R. A. n. s. 12, in a note to *Korn v. Campbell*, 192 N. Y. 490. In general, such a covenant may be enforced by another grantee of the common grantor only when it was made for the benefit of the adjacent land. When similar covenants are inserted in deeds from the common grantor pursuant to a general plan of improvement or development made public by the grantor, each grantee has such an interest in the restrictive covenants in the other deeds, in view of the general plan under which he purchased, that he may enforce such covenants against other grantees. When a general plan of improvement has not been published by the grantor, one grantee can enforce the covenants against another only when they were intended for the benefit of the adjacent lots. The intention to give such right to enforce the covenants must be expressed in the deeds themselves, or must be evident from the covenants in the deeds when viewed in the light of the surrounding circumstances. *De Gray v. Monmouth Beach Club House Co.*, 50 N. J. Eq., 329; *Sailer v. Podolski*, 82 N. J. Eq. 459; *Hays v. St. Paul M. E. Church*, 196 Ill. 633.

Restrictive covenants being in derogation of the landowner's free use of his property, one who claims a right to enforce such covenants has the burden of proving that they were made for his benefit. *McNichol v. Townsend*, 73 N. J. Eq. 276; *Sharp v. Ropes*, 110 Mass. 381.

It is contended that plaintiffs may maintain this action, and *Roberts v. Scull*, 58 N. J. Eq. 396, is cited as sustaining this contention: "But this rule, while operative to enable a subsequent purchaser of land to be benefited by a restrictive covenant to enforce it against the prior purchaser, who made it, and against his assigns, with notice of it, does not work inversely to support the claim of a prior purchaser from the original owner to enforce a restriction imposed by the latter upon a lot subsequently conveyed. *De Gray v. Monmouth Beach Club House Co.*, 50 N. J. Eq. 329. * * * In order to entitle prior purchasers from a common vendor, or those claiming under

them, to enforce such covenants, it must be shown that they are parts of a general plan adopted for the development and improvement of the property by laying it out in streets and lots, prescribing a uniform building scheme, regulating size and style of houses, or uses to which the buildings may be put. *De Gray v. Monmouth Beach Club House Co., supra.*"

It is also claimed by defendant that plaintiff Beeman, being a subsequent purchaser, is not in a position to enforce the restrictive covenants imposed upon defendant's lot. It should be observed that Garloch, in 1909, purchased the two middle lots from the original owner, who imposed the restrictions sought to be imposed in this action. He sold one lot to defendant in 1909, and the other lot to plaintiff Beeman in 1910. The question is: May Beeman enforce the covenant imposed upon Garloch, and the two middle lots in the original deed to Garloch, by the original owners of the four lots? There are not many cases which bear directly on this subject, but the weight of authority denies Beeman's right to sue. In the note to *Korn v. Campbell, supra* (p. 22), the annotator says: "Ordinarily, where the owner of a tract of land sells part of it subject to restrictions, it is a purchaser of part of the land retained who seeks to enforce the restrictions; but where the land sold burdened with the restriction is afterwards divided up, and passes into the hands of different purchasers, the question has been raised whether such purchasers from the original vendee can enforce, as between themselves, the restrictions imposed upon their grantor's land. The courts are not in harmony on this question, but in this class of cases it would seem that the rights of portions of the servient estate to enforce the restriction would be exceedingly doubtful, since the restriction was imposed for the benefit of a different tract of land; that is, the land retained by the grantor—the dominant estate."

The only case cited holding that the action can be maintained is *Winfield v. Henning*, 21 N. J. Eq. 188, where

it is said: "This view is supported by the dictum of Lord Romilly, in a case heard before him at the Rolls, in 1866, *Western v. Macdermot*, 1 Eq. Cas. L. R. (Eng.) *499; and by a decision of the supreme court of Rhode Island, *Greene v. Creighton*, 7 R. I. 1." The Rhode Island decision is not authority for the rule.

The supreme court of Massachusetts, however, has held that such an action cannot be maintained. *Jewell v. Lee*, 14 Allen (Mass.) 145. In that case, Bigelow, C. J., said: "The main ground on which the plaintiff rests his claim to equitable relief is that the condition annexed by the original owner and grantor to his grant of the entire tract of land, of which the plaintiff and defendant now by mesne conveyances severally hold distinct parcels, constitutes a perpetual restriction on the use of the part now owned by the defendant, in the nature of a servitude or easement, on the observance of which the plaintiff, as the owner of the other part of the original parcel, has a right to insist. It is doubtless true that such may be the effect of a condition in a class of cases where it is apparent that the condition was annexed to a grant for the purpose of improving or rendering more beneficial and advantageous the occupation of the estate granted, when it should become divided into separate parcels and be owned by different individuals, or when the manifest object of a restriction on the use of an estate was to benefit another tract adjoining to or in the vicinity of the land on which the restriction is imposed. But, in the absence of any fact or circumstance to show such purpose or object, a condition annexed to a grant can have no effect or operation either at law or in equity beyond that which attaches to it by the rules of the common law. The benefit of the condition would in such cases enure only to the grantor and his heirs or devisees, and the burden of it would rest on the estate to which it was annexed, and on those who hold it or any part of it subject to the condition. Indeed, no restriction on the use of land and no condition annexed to its possession and enjoyment can be for the benefit of

the grantee or those holding his estate in the granted premises, unless it be as a consideration of some restriction on other land, which may operate as an advantage or convenience in the use and occupation of the granted premises. Inasmuch as a grantee can restrict the use of land of which he is the owner according to his own will and pleasure, it is clear that he can derive no benefit from a restriction or condition as such imposed on its use or enjoyment by any prior grantor."

The grantor in this case did not make public a general plan of improvement of the lots sold. The covenants in the deeds to the lots are not uniform. In the lot first sold, and the one farthest from the Nash residence, there is no express prohibition of flats or apartments as in the other deeds. In the deed to the two middle lots the covenants are limited to a 25-year period, after which time business buildings are not prohibited on those two lots. The grantor retained land near the property sold. If the latter were devoted to business uses or to the erection of apartment houses or hospitals, it would affect the use and enjoyment of her residence property. The insertion of restrictive covenants in all the deeds, while some evidence of an intent to develop the lots under a general plan, is consistent with a purpose of protecting the property retained by the grantor as a residence. There is nothing in the deeds, outside of the fact that covenants were inserted in all of them, that indicates that they were inserted for the benefit of other grantees. There is no covenant to insert such restrictions in subsequent deeds to the adjoining lots. Defendant is bound by the knowledge imparted to her by the language of the deed, and the surrounding circumstances, and not by the secret intentions of the grantor or what was orally promised to the other grantees. *Hays v. St. Paul M. E. Church, supra.*

We are of opinion that plaintiffs have not met the burden of proving that the covenants in the deeds from Mrs. Nash were not made exclusively for her benefit, but were made for the benefit of other grantees of adjoining land.

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It is insisted that, as to Beeman, he can enforce the covenants under the rule that, where the owner of two lots inserts restrictive covenants in a deed conveying one of the lots, such covenants may be enforced by the grantor or grantee of the remaining lot. That rule is not applicable to the facts in this case. While the deed to defendant from Garloch, the owner of the two middle lots, did contain the restrictive covenants, they were merely the covenants inserted by his grantor. While the authorities on the questions presented are not entirely in harmony, we feel constrained to follow what seems to be the rule, above stated.

We are also of the opinion that plaintiffs have failed to show such a use of defendant's premises as amounts to a violation of the covenant contained in her deed.

The decree of the district court is therefore reversed, and the action is dismissed.

REVERSED AND DISMISSED.

MORRISSEY, C. J., and LETTON and SEDGWICK, JJ., dissenting.

Independent of the covenants in the Nash deed, plaintiff Beeman is entitled to the relief sought. Garloch was the owner of two lots. He sold one of them with a restrictive covenant in the deed for the benefit of the lot which he retained. About ten months afterwards he sold the latter lot with a like covenant to plaintiff Beeman. The rule is that where the common grantor of two adjoining lots sells one and retains the other, and inserts in the deed of the one sold a covenant restricting the manner in which buildings to be erected on the lot sold may be used or where or how they shall be built, which covenant is plainly for the benefit of the lot which he retains, and he afterwards sells the latter lot, the covenant passes to the purchaser of the same, and he may enforce it against the owner of the other lot. The majority opinion holds that the restriction in Garloch's deed to defendant cannot be enforced by Beeman because that restriction was the same

in substance as in Garloch's deed from Nash. No reason is given for this statement, and we apprehend that no reason can be given for holding that Garloch could not enforce the same restriction on the property deeded by him that was in the deed under which he himself took title. Repeating a quotation in the majority opinion from *Jewell v. Lee*, 14 Allen (Mass.) 145, "inasmuch as a grantee can restrict the use of land of which he is the owner according to his own will and pleasure," the restriction in Garloch's deed to defendant would be enforceable by either Garloch or his subsequent grantee.

FRED NELSON, APPELLEE, v. PETER E. NELSON, APPELLANT.

FILED MARCH 4, 1916. No. 18649.

1. **Contracts: RESCISSION.** "Payments or concessions exacted from the owner of property unlawfully withheld, in order to obtain possession thereof, where the detention is accompanied by immediate hardship or irreparable injury, may be avoided on the ground of compulsion, although not amounting to technical duress." *Weber v. Kirkendall*, 44 Neb. 766.
2. **Trial: EXCLUSION OF EVIDENCE.** An itemized receipt prepared by the attorney of a party, which the opposite party refused to accept, is not binding on the party refusing to accept it, and may be excluded without error when offered in evidence.
3. **Verdict: AMOUNT.** Plaintiff claimed \$2,000 damages for failure of the defendant to properly care for his cattle while in defendant's possession, and \$208 for a failure to return four head thereof. *Held*, that a verdict for \$208 for those items was not excessive.
4. **Novation.** An agreement between two parties that one of them shall pay a third person an amount of money for which they were separately liable in equal parts does not create a novation unless and until the third party sanctions such an agreement.

APPEAL from the district court for Douglas county:
LEE S. ESTELLE, JUDGE. *Affirmed on condition.*

Byron G. Burbank, for appellant.

William Baird & Sons, contra.

BARNES, J.

This was an action at law in which plaintiff sought to recover damages arising out of an exchange of properties between himself and defendant. The petition contained six counts or causes of action. The issues made by the pleadings were submitted to a jury in the district court for Douglas county, and resulted in a verdict by which plaintiff recovered on his first, second, third and fifth causes of action. The verdict as to the fourth and sixth causes of action was for the defendant. Judgment was rendered on the verdict for \$1,284.63 in favor of plaintiff, and the defendant has appealed.

The record discloses that plaintiff, by his petition, sought to recover on his first cause of action the value of 18 head of cattle which defendant failed to deliver to him according to the terms of their contract, amounting to \$540, and for \$25 worth of furniture which defendant failed to deliver to plaintiff under his agreement. The plaintiff sustained this cause of action by sufficient evidence. Defendant contends, however, that the trial court erred in receiving the evidence of the plaintiff as to the value of the cattle because he was not interrogated as to their market value. According to the record, the parties agreed in writing, when they exchanged properties, that the grown cattle were worth \$40 a head, and the calves, if any, were worth \$20 each. Plaintiff was unable to see the cattle, by reason of the failure of defendant to deliver the 18 head. He was compelled to rely on the value fixed by the agreement, made when the exchange of properties was consummated, and his testimony fixing the average value at \$30 a head was admissible. On this count, the verdict of the jury was for \$540, and, being sustained by the evidence, this court will not set it aside.

As to the second cause of action, it appears that in the exchange of properties plaintiff gave the defendant two

notes, one for \$469, due January 11, 1913, and one for \$1,617, due October 11, 1913, each bearing interest at 6 per cent., secured by a chattel mortgage on the 275 head of cattle which defendant agreed to deliver to the plaintiff; that defendant also agreed to assign and deliver certain leases of grazing lands to the plaintiff and convey to him two lots in Pine Bluffs, Wyoming, before the first of the said notes should become due. Defendant failed to assign said leases and convey the said lots to plaintiff within the time agreed upon, and when the first of the notes became due he seized the cattle under his chattel mortgage and proceeded to advertise the same for sale for the whole amount due on both notes. In order to obtain possession of the cattle, plaintiff was obliged to, and did, pay the defendant the sum of \$2,590.15, which was \$504.15 more than the sum due on both notes, and by the second cause of action plaintiff sought to recover that amount. The jury gave him a verdict on that count for \$449.13, and, as we view the record, the evidence sustains that amount.

"Payments or concessions exacted from the owner of property unlawfully withheld, in order to obtain possession thereof, where the detention is accompanied by immediate hardship or irreparable injury, may be avoided on the ground of compulsion, although not amounting to technical duress." *Weber v. Kirkendall*, 44 Neb. 766. *First Nat. Bank v. Sargeant*, 65 Neb. 594; 30 Cyc. 1308.

It is contended, however, that the verdict as to this cause of action was excessive, in that defendant should have been allowed a credit of \$141.91. This contention cannot be sustained, because there is no claim for that amount in the pleadings, and it is quite clear that the jury were not entitled to consider that item.

Defendant also contends that the trial court erred in excluding a receipt prepared by his attorney, which was offered to plaintiff at the time he paid the \$2,590.15 to the defendant in order to obtain possession of his cattle. The record shows that the plaintiff refused to accept this

receipt, and therefore was not bound by it. At most, it was a self-serving document prepared by defendant's attorney for the evident purpose of preventing plaintiff from maintaining a suit to recover the amount of money paid by him in excess of the sum due on the chattel mortgage. The court did not err in excluding this pretended receipt.

Plaintiff, by his third cause of action, sought to recover the value of four head of cattle, taken under the mortgage, which were not returned to him by the defendant, and \$2,000 damages to the cattle while they were in defendant's possession. The jury returned a verdict on this cause of action for \$208, which was the reasonable value of the cattle not returned, and refused to allow plaintiff any damages for defendant's failure to properly feed and care for the stock while they were in his possession. An examination of the record fails to furnish any reason for setting aside the verdict on that cause of action.

Plaintiff's fifth cause of action was to recover the sum of \$87.50, one-half of the commission claimed by one Davis, who negotiated the exchange of properties. It appears that Davis owed the plaintiff, and it was agreed that plaintiff should pay him the whole commission, of which defendant was to pay one-half. But Davis refused to release the defendant, who afterwards paid him \$87.50. The testimony shows that, in a suit between plaintiff and Davis, plaintiff did pay Davis \$100, but we are of opinion that defendant was not released from paying one-half of the commission, and was entitled to receive credit for the \$87.50, which he paid. The verdict of the jury on that count cannot be sustained.

By the sixth and last cause of action, plaintiff sought to recover the sum of \$15 for borrowed money. The jury properly found for him on that count.

Numerous errors are assigned by counsel for defendant, but after a careful review of the record we are of opinion that they cannot be sustained.

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The cause was fairly tried, was properly submitted to the jury, and, if plaintiff files a remittitur for \$87.50 within 20 days from the filing of this opinion, the judgment of the district court will stand affirmed; each party to pay his own costs of this court.

AFFIRMED.

SEDGWICK, J., not sitting.

GRACE M. HOOPES, APPELLANT, v. CITY OF OMAHA ET AL.,
APPELLEES.

FILED MARCH 4, 1916. No. 18553.

1. **Municipal Corporations: PUBLIC IMPROVEMENTS: NOTICE.** Published notice directed to "owners of lots within" an improvement district, as shown by an ordinance and a public plat, and to the "owners of lots abutting on or adjacent to" a street designated by name, that a petition has been filed for the paving of such street, may be binding on the owner of a lot 49 feet from the street to be improved but connected therewith by another street and an alley. Rev. St. 1913, sec. 4295.
2. ———: ———: **PETITION: FINDING OF COUNCIL.** The legislature in enacting a city charter may make the finding of a city council that a petition for the creation of an improvement district is "regular, legal and sufficient," conclusive except upon appeal, notice of the petition and of the making of an assessment being required. Rev. St. 1913, sec. 4299.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Affirmed.*

Charles S. Elgutter, J. W. Schopp and W. D. Griffin, for appellant.

John A. Rine and W. C. Lambert, contra.

ROSE, J.

This is a suit to enjoin the collection of a special assessment of \$132.75 against lot 13, block 8, Creighton's First addition to Omaha, for curbing and paving. The lot de-

scribed is owned by plaintiff and fronts on Thirty-third street, but is in improvement district No. 1204 which was created by ordinance for the purpose of curbing and paving Arbor street between Thirty-second avenue and Thirty-fifth street. The city of Omaha and its treasurer are defendants. From a dismissal of the action, plaintiff has appealed.

It is insisted that the petition for the improvements is not signed by "the record owners of a majority of the frontage of taxable property in such district," as required by the city charter. Rev. St. 1913, sec. 4287. In this connection it is argued by plaintiff that the council was without jurisdiction to order the improvements, and that therefore the assessment is void. Defendants take the position that the city council, as authorized by law, made a conclusive finding that the petition was "regular, legal and sufficient." Rev. St. 1913, sec. 4299. Plaintiff assails the finding as void on the ground that published notice of the filing of the petition was fatally defective. Attention is thus directed to the terms of the city charter and to the publication of notice. The statute provides:

"The city council shall by resolution direct the city clerk to cause a copy of the petition to be published for three days in the official paper of the city, with a notice thereto attached directed to the property owners generally in the district that they shall have twenty days from the first day's publication of the petition and notice to file a protest in the office of the city clerk against the regularity or sufficiency of the petition or any signature thereon." Rev. St. 1913, sec. 4295.

In the published notice reference was made to the property owners and to their realty as follows: "To the owners of all lots, lands, tracts and parcels of land within street improvement district No. 1204, and to the owners of all lots, lands, tracts and parcels of land abutting on or adjacent to that part of Arbor street from Thirty-second avenue to Thirty-fifth street in the city of Omaha, Nebraska."

Since plaintiff was not designated by name, was there a sufficient description of her property to charge her with notice as owner? Her lot was in the improvement district as shown by an ordinance and by a public plat. Was she the owner of "land abutting on or adjacent to" that part of Arbor street between Thirty-second avenue and Thirty-fifth street? Her lot fronts on Thirty-third street, a thoroughfare entering Arbor street at right angles. Between Arbor street and the property of plaintiff there is nothing but a corner lot 49 feet wide. From the rear of her premises to Arbor street, a distance of 49 feet, there is an alley. Notice of a purpose to improve Arbor street at that place would naturally arrest the attention of persons owning property there. The question is: Was the publication technically sufficient for that purpose?

In 2 Page and Jones, Taxation by Local and Special Assessment, sec. 751, it is said: "In the absence of a statute specifically requiring it, it is not necessary that a notice be given to the property owners by name. It may be addressed generally to the owners of land, designated in a certain manner; as to the owners of land abutting upon a specified part of a designated street. * * * If the notice shows what land is to be affected, it is sufficient if it is addressed 'To whom it may concern,' or to 'all interested.' * * * The notice must, however, give either the name of the property owner or such reference to his property that it may be determined thereby."

The notice was directed to the owners of lots "abutting on or adjacent to" that part of Arbor street between Thirty-second avenue and Thirty-fifth street. The word "adjacent," in the popular sense thus used, obviously means something in addition to, or different from, "abutting." It may fairly include plaintiff's lot. In construing the word "adjacent," it was said in *Dunker v. City of Des Moines*, 156 Ia. 292: "The word 'adjacent' is, at least, somewhat indefinite. Ordinarily, it means 'to lie near, close, or contiguous.' Webster. Even in its strictest sense it means no more than lying near, close, or contigu-

ous, but not actually touching." This definition is approved in *Hennessy v. Douglas County*, 99 Wis. 129; *Northern P. R. Co. v. Douglas County*, 145 Wis. 288. The conclusion is that the notice in the present case was sufficient to inform plaintiff that her property would be affected by the proposed improvement.

Since plaintiff is bound by the published notice, is she precluded by the finding of the city council that the petition was sufficient? The city charter provides:

"In case no protest is filed within the time hereinbefore provided, the city council shall have the power at any regular or special meeting, without further notice, to find, adjudge and determine by resolution that such petition is regular, legal and sufficient." Rev. St. 1913, sec. 4298.

"In either case, such resolution of determination and adjudication shall be final and binding as the final order, judgment and determination of a court of inferior jurisdiction; and after the passage of such resolution adjudging said petition to be regular, legal and sufficient, no court shall entertain any action for the purpose of attacking the regularity, legality or sufficiency of such petition, except upon appeal as hereinafter provided." Rev. St. 1913, sec. 4299.

Where the statute makes the filing of a proper petition jurisdictional, the finding of the city council that the petition is sufficient is not conclusive, if, in fact, it is defective. *Morse v. City of Omaha*, 67 Neb. 426. In that case, however, it was said: "In the statute under consideration there is an entire absence of any provision tending to make the action of the city council in passing upon the petition final and conclusive."

The present charter of Omaha makes the findings of the council final. The council acted under the statute and sustained the petition. Plaintiff did not appeal. She is therefore bound by the decision, if the statute is valid. A similar provision in the Denver charter was sustained in *Londoner v. City and County of Denver*, 210 U. S. 373, wherein it was said:

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"In the exercise of this authority the city council, in the ordinance directing the improvement to be made, adjudged, in effect, that a proper petition had been filed. * * * The only question for this court is whether the charter provision authorizing such a finding, without notice to the landowners, denies to them due process of law. We think it does not. The proceedings, from the beginning up to and including the passage of the ordinance authorizing the work did not include any assessment, or necessitate any assessment, although they laid the foundation for an assessment, which might or might not subsequently be made. Clearly all this might validly be done without hearing to the landowners, provided a hearing upon the assessment itself is afforded. *Voight v. Detroit*, 184 U. S. 115; *Goodrich v. Detroit*, 184 U. S. 432. The legislature might have authorized the making of improvements by the city council without any petition. If it chose to exact a petition as a security for wise and just action it could, so far as the federal Constitution is concerned, accompany that condition with a provision that the council, with or without notice, should determine finally whether it had been performed."

The invalidity of that part of the city charter authorizing the city council to pass on the sufficiency of a petition for an improvement and making its decision final, unless set aside on appeal, has not been shown. Notice of the filing of the petition for the improvement having been given pursuant to law, the council's adjudication that it was "regular, legal and sufficient," is final. This conclusion makes a discussion of other questions unnecessary and results in the affirmance of the judgment of the district court.

AFFIRMED.

SEDGWICK, J., not sitting.

JULES ALTHAUS V. STATE OF NEBRASKA.

FILED MARCH 4, 1916. No. 19411.

1. **Constitutional Law: BROKERS: INTEREST.** The act fixing the maximum rate of interest at 10 per cent. per annum, providing for the issuance of a license, and authorizing licensed money-lenders to charge a brokerage fee not exceeding one-tenth of the money actually lent and, in exceptional cases, an examination fee of 50 cents, in addition to interest, is not unconstitutional as being a "local or special law * * * regulating the interest on money," nor as denying "the equal protection of the laws." Laws 1915, ch. 204.
2. ———: ———: **VALIDITY OF STATUTE.** The act conferring upon the secretary of state, after a hearing, power to reject an application for a license to lend money is not unconstitutional as conferring upon that officer arbitrary power. Laws 1915, ch. 204, sec. 3.

ERROR to the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

Smyth, Smith & Schall, for plaintiff in error.

Willis E. Reed, Attorney General, and *C. S. Roe*, *contra.*

J. P. Palmer, *amicus curiæ.*

ROSE, J.

In a prosecution by the state in the district court for Douglas county, Jules Althaus was convicted of violating a statute fixing the maximum rate of interest at 10 per cent. per annum, providing for the issuance of a license, and authorizing licensed money-lenders to charge a brokerage fee not exceeding one-tenth of the money actually lent and, in exceptional cases, an examination fee of 50 cents, in addition to interest. Laws 1915, ch. 204. For that offense defendant was sentenced to pay a fine of \$25. As plaintiff in error he now presents for review the record of his conviction.

Defendant challenges the constitutionality of the act under which he was prosecuted. In substance, the statute provides that it shall be unlawful to make a loan of money at a rate of interest in excess of 10 per cent. per annum, but empowers the secretary of state to issue to an applicant who pays an annual fee of \$60 and executes a bond for \$2,000 signed by a duly approved surety company a license authorizing the licensee to charge, in addition to interest, a brokerage fee equal to one-tenth of the amount of money actually lent and, in cases where the loan does not exceed \$50 and is not secured by personal property, an examination fee of 50 cents. Laws 1915, ch. 204.

Defendant's principal objections to the act are that it violates section 15, art. III of the Constitution, prohibiting local and special laws regulating the interest on money, and creates an unreasonable and arbitrary class of money-lenders who are permitted to exact the equivalent of 20 per cent. interest per annum. The power of the legislature to regulate interest cannot be questioned. *State v. Carey*, 126 Wis. 135, 11 L. R. A. n. s. 174. Legislation like that under consideration is within the police power of the state. *Griffith v. State of Connecticut*, 218 U. S. 563. The evils against which the law is directed had become a public scandal. The rapacity of money-lenders who impounded chattels and wages to secure small loans to those in pecuniary distress had become intolerable. Persons engaged in that business were practically uncontrolled. Many of their operations were secret, but the iniquity of their compensation for the use of money created a demand for the restraints of police power. The act in controversy not only puts a limit on exactions for the use of money, but provides punishment for the violation of its provisions and opens to official scrutiny the transactions of all who are authorized to charge limited fees in addition to interest at the rate of 10 per cent. per annum. The law assailed regulates the interest chargeable by two classes—unlicensed lenders of money limited to 10 per cent. per annum,

and licensed lenders authorized to make an additional charge, called a "brokerage fee," not exceeding one-tenth of the money actually lent and, in exceptional cases, to charge an examination fee of 50 cents. The latter class is open to all who comply with the terms of the statute. One class of borrowers may be required to pay more for their loans than others, but this condition already existed and was not created by legislation. The lawmakers recognized a class of borrowers from whom exorbitant rates of interest had been exacted under existing conditions and attempted to afford them some measure of protection. Those making such loans are required to obtain a license. Their methods of doing business are regulated. The act makes no discrimination against any class of borrowers. It is not unconstitutional as being a "local or special law * * * regulating the interest on money." The better rule is that the classification is neither unreasonable nor arbitrary. It is also clear that the act does not deny the equal protection of the laws. *Reagan v. District of Columbia*, 41 App. D. C. 409; *Griffith v. State of Connecticut*, 218 U. S. 563.

Defendant relies upon *Commonwealth v. Young*, 248 Pa. St. 458. It must be conceded that the opinion in that case is not in harmony with the views herein expressed. The philosophy of the legislation, the police power under which it was enacted, proper classification in regulating the interest on money, and existing conditions calling for a remedy do not seem to have been recognized by the Pennsylvania court.

Defendant further insists that the act is void because a section thereof requires the applicant to furnish a bond executed by a surety company. Laws 1915, ch. 204, sec. 4. The determination of this question is not necessary to a decision, for the reason that a ruling thereon in favor of defendant would not affect the validity of the act as a whole or result in an acquittal.

It is further argued that the act is unconstitutional because it confers upon the secretary of state arbitrary

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power to reject applications for licenses without providing a method for reviewing his acts. There is no attempt to vest an arbitrary authority in the secretary of state. Adequate remedies exist for the protection of any legal rights infringed by the unwarranted rejection of an application for a license.

Invalidity of the act has not been shown. The judgment is therefore

AFFIRMED.

SEDGWICK, J., not sitting.

HAMER, J., dissenting.

The act under consideration in this case should be entitled an act to license usurers and their assistants to live off the poor. This act is claimed to have been provided especially for the benefit of the unfortunate. The first section contains a proviso that the person who contemplates the loaning of money at the illegal rate specified and under the conditions provided shall be entitled to a license from the secretary of state to engage in his peculiar business. He is guaranteed a protection that other money-lenders do not enjoy. He is exempt from the operation of the usury law if he has a license. To get a license he has to pay the secretary of state \$60 per annum. He must also give a bond in the sum of \$2,000 conditioned for the faithful performance of his duties as licensee, and the prompt payment of any judgment which may be recovered against him. Deputy inspectors shall be appointed in each county in the state and they are to inspect the books and records of these licensed money-lenders. The inspectors shall receive for their services \$5 a day to be paid by the person or corporation that borrows the money. While this act purports to have been passed for the benefit of the unfortunate who are poor, it enables the collection of oppressive rates from those who are probably distressed. I do not question the good intent of the legislators who passed the act upon the theory that they were helping somebody, but I doubt its efficiency, and I think it is

clearly unconstitutional. It discriminates between borrowers, and compels those who are least able to pay, to pay the highest rates. It also places the licensee beyond attack. The opinion of the majority should declare the act unconstitutional and void. That would give an opportunity for a new act to be passed in which the poor become actual beneficiaries.

HARRY WHETSTONE V. STATE OF NEBRASKA.

FILED MARCH 4, 1916. No. 19414.

Rape: EVIDENCE: CORROBORATION. In a prosecution for rape upon a female child not previously unchaste, proof of facts and circumstances justifying a finding, independently of her own testimony, that accused had the opportunity and the inclination to ravish her may be sufficient corroboration of direct and positive evidence by her that he did so.

ERROR to the district court for Keya Paha county: **R. DICKSON, JUDGE.** *Affirmed.*

Ed. D. Clarke, Ross Amspoker, Allen G. Fisher and William P. Rooney, for plaintiff in error.

Willis E. Reed, Attorney General, and Charles S. Roe, contra.

ROSE, J.

In the district court for Keya Paha county, defendant was convicted of rape, and for that offense was sentenced to serve a term of four years in the penitentiary. As plaintiff in error, he presents for review the record of his conviction.

Defendant insists that the sentence cannot be upheld because the verdict, as he views the evidence, is supported only by the uncorroborated testimony of prosecutrix. She was called as a witness, and in direct and positive

terms testified to defendant's felonious act as charged in the information and to the time, place and manner of its commission. She was at the time 15 years and 10 days old. Unless she committed perjury, she was not previously unchaste. Evidence to that effect is not disputed in the record. Her story is believable. A motive for false testimony on her part is not disclosed. Defendant was not eligible as an honorable suitor, because he already had a wife. At the time of the trial prosecutrix was not disturbed by prospects of maternity or by pecuniary demands of illegitimate offspring. There is no intimation of a purpose from any source to demand or extort money from defendant. According to the story of prosecutrix, the offense was committed Saturday night, June 26, 1915, at the home of Harrison Morrison, a farmer living with his wife and two children five miles west of Norden. Prosecutrix was a relative of Morrison and had been in his home a few days in the capacity of a domestic. In addition to her testimony, there is proof of these facts: During the afternoon of the day mentioned, defendant, alone in a buggy, drove in a roundabout way to the home of Morrison, knowing that it was the latter's custom to visit Norden with his wife and children Saturday afternoon. Defendant knew that prosecutrix had left her home a few days earlier to go to Morrison's. When defendant arrived there in the afternoon, all of the Morrison family, including prosecutrix, were absent. Defendant waited there alone until they returned from Norden, though he said he had started to that village, a place to which he did not go. In the evening he and prosecutrix conversed for a time in a little vestibule opening into the kitchen of the Morrison home. Night came on and defendant did not leave. He was asked to stay all night, but declined. Finally, his host evinced an intention to retire for the night. Whereupon defendant intimated that he was about to start home. After the Morrisons had all gone to the second floor of the house to retire for the night, defendant went from the kitchen into the sitting-room downstairs,

found prosecutrix there alone, and conversed with her. Though he had previously stated that he had stopped at Morrison's for protection from the rain, and had declined an invitation to stay all night, he left in the rain immediately after he had had the time and the opportunity to commit the crime. Proof of these corroborating facts and circumstances does not depend on the testimony of the prosecutrix. Evidence of the opportunity to commit the crime is uncontradicted. The inclination of defendant to ravish prosecutrix may fairly be inferred from the outlined facts and circumstances proved by other witnesses. Corroboration of a similar nature was held sufficient in *State v. McCausland*, 137 Ia. 354, the court saying:

"It was shown by the testimony of persons other than the prosecuting witness that defendant was seen with this young girl in a public place at a late hour on the night when the crime is alleged to have been committed, and circumstances were shown from which the jury could be justified in finding that he accompanied her from the place where they were first seen together through the street, and up a flight of stairs, where they entered a darkened room, which according to the story of the prosecutrix was the scene of the offense."

The direct and corroborating evidence is sufficient to sustain the conviction.

Other assignments of error are directed to the conduct of the presiding judge in interrupting the examination of witnesses, in preventing the answering of questions, and in asking other questions. In these respects the record shows that the trial court protected the rights of defendant, prevented error, and avoided unnecessary cross-examination, without making a mistake or prejudicing defendant.

Complaint is also made of rulings in giving and refusing instructions. No debatable question is raised by such rulings. The charge is exceptionally free from error. Every right of defendant was safeguarded. The instruc-

tions given covered the entire case and conformed to established rules of law applicable to the evidence.

AFFIRMED.

FAWCETT, J., not voting.

SEDGWICK, J., dissenting.

The crime of rape is one of the most detested of crimes. It is a crime against the virtue of womanhood. "The object of the statute is to protect the virtuous maidens of the commonwealth, to protect those girls who are undefiled virgins; and a female under 18 years of age and over 15 years of age who has been guilty of unlawful sexual intercourse with a male is not within the act." *Bailey v. State*, 57 Neb. 706. If this young girl was previously chaste and was ruined by this defendant, he richly deserves the punishment for rape which the statute provides may be 20 years in the penitentiary. If she was not a pure girl, the crime which this defendant has committed, if he has done the act charged, is principally in degrading himself and indirectly injuring his wife and children. That crime is not rape; it is adultery, and the punishment is a short term in the county jail. When the crime of rape is committed against a girl under the age of consent, the substance of the crime is the violation of her chastity, and must be proved beyond a reasonable doubt. "Where the prosecutrix is over 16 years of age at the time of the alleged commission of the crime, the evidence should show, beyond a reasonable doubt, that she was not previously unchaste." *Burk v. State*, 79 Neb. 241. The prosecuting witness, when she was asked the direct leading question by her attorney, said that she was not previously unchaste. The opinion makes a feeble attempt to show that she was corroborated as to the act itself, but there is no intimation in the evidence or in the majority opinion that she was corroborated as to her purity. "Unless she committed perjury, she was not previously unchaste. Evidence to that effect is not disputed in the record." This is all that is said in the opinion on this subject. There is such a great, such an immeasurable distance between a pure girl

and one who has trifled away or has been robbed of her virtue, that the law may well punish him who deliberately plans to destroy her by the extreme penalty. It is presumably just and reasonable that the gravamen of such a crime should be proved so as to remove all reasonable doubt of the guilt of the man charged. If it is required that the prosecuting witness should be corroborated in any particular, there is greater reason to require it upon this issue than upon any other. Generally, a wanton girl will not hesitate to swear to her own purity. When she yields her virtue, she yields all, and rarely retains a high regard for truth. If truthful, she is generally virtuous, and *vice versa*. A virtuous girl is known by all her acquaintances to be virtuous. It is no hardship to require conclusive proof. A wanton woman advertises that fact by her conduct and demeanor wherever she goes.

There is not only no corroboration as to the chastity of the girl, but also a total failure of corroboration as to the act itself. Everything named in the opinion as corroboration is equally consistent with innocence as with guilt. Morrison and his family were not in the habit of going to Norden every Saturday. It was only occasionally that they did so. They would be more likely to take the girl with them than to leave her at home alone. The defendant was as much in the habit of driving Saturday as were they. He and the Morrison family were old-time acquaintances and friends. The fact that defendant drove out of his way to go to Morrison's is equally consistent with innocence on his part. That he remained there in the storm until Morrison returned and did not go to Norden, that he visited with the family, and conversed with the girl for an hour "in the vestibule opening into the kitchen," furnishes no corroboration. They passed the evening in the usual social manner, and at about 10 o'clock Mr. Morrison asked the defendant to stay for the night. He declined, saying that he must be at home in the morning early to care for his stock. Mr. Morrison then announced that he would retire for the night. Mrs. Morri-

son started at once for their room at the head of the stairs, and Morrison followed her within a minute or two. Within five or ten minutes thereafter the defendant left for his home. In the meantime it is alleged that this crime was committed. The lights were burning, the doors were open, and considerable noise in any part of the little house could be heard throughout the building. The details of the commission of the alleged crime in those five or ten minutes are given solely by the prosecutrix, and this testimony of hers can, of course, furnish no corroboration of itself. Twice during the evening and after the two children had retired, Mr. and Mrs. Morrison went out of the house, and were gone one or two minutes; once when it was thought an automobile in which they were interested was passing, and once to close the door of the chicken house a couple of rods distant, and on one of these occasions the defendant and the girl were standing in the hall talking. The defendant had left his hat and gloves in the sitting-room, and he testifies that when Morrison declared that he would retire for the night the girl went into the sitting-room to get his (defendant's) hat and gloves for him, and he followed through the hall door which was left open, and could not at once find his hat and gloves, which delayed him possibly five minutes, and as soon as they secured his hat and gloves he went home.

In all this there is no proof of a single fact that tends to prove a disposition on his part to commit such a crime. Proof of opportunity alone without indication of any improper conduct will, of course, not amount to corroboration. The proof of opportunity is not sufficient. The evidence of Mr. and Mrs. Morrison shows that, when Morrison announced that he would retire, it amounted to an invitation to defendant to either stay for the night or go, and defendant acted accordingly. He started at once for his hat and gloves, and Morrison says he had left the house within five or ten minutes. Was a chaste and virtuous girl ruined in those five or ten minutes? Neither

the act itself nor the chastity of the girl is proved beyond a reasonable doubt.

HAMER, J., dissenting.

I dissent from the opinion of the majority.

1. There was no evidence tending to corroborate the testimony of the prosecutrix that she was chaste. I have read all the evidence. The girl and the man talked together after the Morrison family went upstairs to retire. Up to that time I am unable to find anything which tends to corroborate her story. Defendant was a young married man, and while he visited with Morrison he also talked to the girl in the sociable and easy way which is not uncommon in the country, where people do not isolate themselves, but visit and talk together. It was not at all strange that the defendant and Morrison should visit each other. They were in the habit of doing so. They exchanged work together at times. They were probably the very best of friends. I am unable to find any sort of corroboration in the story recited by the prosecutrix. If the crime was committed, as she says it was, it is difficult to understand how she could have been chaste at that time. She testified that they went into the front or south room, and then that he blew out the light which was burning there. She got a rocking chair and sat in it. That she did not intend to go away is apparent from the fact that she sat in the chair and did not go upstairs. If she had been a good girl and chaste, she would have cried out, and Mr. and Mrs. Morrison, who were lying awake in the bed upstairs and only a few feet distant from her, would have been down stairs in two or three seconds. If the prosecutrix was guilty, then the man was guilty, but he could not be guilty of rape, for the woman was not chaste.

2. The charge against the defendant is that the girl was under the age of 18 years, to wit, of the age of 15 years; that she was not previously unchaste; that the defendant unlawfully and feloniously made an assault upon her; and that he unlawfully and feloniously ravished and

carnally knew her. The charge is under the last clause of section 8588, Rev. St. 1913, and contemplates that the act is done with the consent of the prosecutrix. The information does not allege that the act was committed "with her consent." The necessary provision of the statute is left out. The necessary facts therefore were not in the information. The language of the statute is, "shall carnally know or abuse any female child under the age of 18 years with her consent." In *Bailey v. State*, 57 Neb. 706, it is said in the body of the opinion: "To sustain a criminal conviction it is not enough for the state to show that the person indicted has violated the spirit of the statute, but the evidence must show beyond a reasonable doubt that he has offended against the very letter of the law." In *Burk v. State*, 79 Neb. 241, it is said in the syllabus: "The evidence should show, beyond a reasonable doubt, that she was not previously unchaste." There was no evidence touching this subject. In the body of the opinion in *Burk v. State*, *supra*, it was said that, if the case had to be tried over again, it would seem necessary for the state to produce some corroborating evidence as to the principal fact, "and of the previous chastity of the prosecutrix."

3. The fourth instruction is to effect that the offense must be committed with a "female under the age of 18 years with her consent." The defendant was not tried for the offense described in the statute, and he was not tried for the offense set out in the instruction. To proceed against the accused as if he unlawfully and feloniously ravished and assaulted her could not well have been otherwise than to the prejudice of the defendant. He was tried for violence.

4. Section 6 of the instructions given by the court contains the following: "The doubt which the juror is allowed to retain in his own mind, and under which he should render his verdict of not guilty, must always be a reasonable one. A doubt produced by undue sensibility in the mind of any juror in view of the consequences of his verdict, is not a reasonable doubt, and a juror is not

allowed to create sources of material doubt by resorting to trivial or fanciful suppositions and remote conjectures as to possible states of fact different from that established by the evidence. Hence, if, after a careful and impartial consideration of all the evidence, you can say that you feel an abiding conviction of the guilt of the defendant and are satisfied to a moral certainty, a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously on the truth of the charge made against the defendant, then, and in that event, you are as jurors satisfied beyond a reasonable doubt. A reasonable doubt does not consist of possible or conjectural doubt, but a doubt that would justify an acquittal must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case."

To say that a juror must justify himself for what he does as a juryman is to make him an object of suspicion. The tendency of that sort of an instruction is to intimidate the juror. That instruction originated in the anarchist cases tried in Chicago. Apparently it was framed to compel the jurors to disregard the doctrine of reasonable doubt.

5. In instruction 11, given by the court on its own motion, it is said that the prosecutrix need not be "corroborated" by the testimony of other witnesses; that it is sufficient if she shall be corroborated as to the material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn. Some rule should have been laid down by the trial judge enabling the jury to rest their conclusion upon facts shown to exist in the case not dependent upon the testimony of the prosecutrix. This was not done.

6. The alleged facts as the prosecutrix recites them do not seem probable. According to her testimony, Mr. and Mrs. Morrison went up to bed. They put a light on the bureau at the head of the stairs. There were no doors

in the way, and the light shone down to where the prosecutrix and the defendant were. There was also a stove-pipe hole up through the ceiling. With the light shining down the stairway where Morrison and his wife had just retired to bed and were then awake, is it probable that the prosecutrix and the defendant would have taken their chances of discovery? "Q. Well, wait a minute; it shined down while they were up there? A. I suppose it did. Q. And you could see the light? A. No, I could not see the lamp, I could see the light. Q. Well, that is what I asked you, the light shone down stairs on you and Harry Whetstone, didn't it? A. Yes, sir. Q. And if either Mr. or Mrs. Morrison looked down from up there, they could see you standing there? A. Well, we wasn't there very long."

Mrs. Morrison testified that there was a light up at the head of the stairs nearly all the evening, and that it shone down where the defendant and the prosecutrix were standing. If the testimony of the Morrisons is truthful, the probability of the defendant's guilt would seem to be remote. Whatever the facts may be, they are not shown by the evidence to have had intercourse.

7. This man should not be sent to the penitentiary on the evidence presented against him. If this man is guilty of anything, it is adultery. There is no penitentiary sentence for that. Of course, we ought not to disregard legal rights. "A single act of sexual intercourse by a married man with an unmarried woman constitutes the crime of adultery." *State v. Byrum*, 60 Neb. 384. This defendant can be prosecuted for adultery under the facts shown, and, if found guilty, could be imprisoned in the county jail not exceeding one year. Section 8767, Rev. St. 1913.

GUS TESKE, APPELLANT, v. CARL BAUMGART, APPELLEE.

FILED MARCH 4, 1916. No. 18573.

Bills and Notes: ACTION: DEFENSE OF ALTERATION: BURDEN OF PROOF.

The rule must be considered settled in this state that, in an action upon a promissory note, which is regular upon its face, the burden of establishing a defense that the instrument had been fraudulently altered by the holder thereof after its execution and delivery is upon the defendant; and the fact that such a defense may be shown under the general issue does not change the rule. *Ohio Nat. Bank v. Gill Bros.*, 85 Neb. 718, in so far as it conflicts herewith, is overruled.

APPEAL from the district court for Platte county:
GEORGE H. THOMAS, JUDGE. *Reversed.*

A. M. Post, for appellant.

Reeder & Lightner and *R. P. Drake*, *contra*.

FAWCETT, J.

Action on a promissory note. Judgment for defendant. Plaintiff appeals.

The first three assignments of error may be considered together. Under these assignments it is contended that the court erred in giving instructions 3 and 5 on its own motion, thereby imposing upon plaintiff the burden of proof as to a claimed alteration of the note in suit.

The original note for \$1,620 was introduced in evidence and is before us. It bears no evidence whatever upon its face of any alteration either before or after its execution. The petition is in the usual form. The answer is a general denial, followed by lengthy allegations of affirmative matters pleaded as set-off. No further attention need be paid to this branch of the case, as judgment went against the defendant on his set-off, and he has not appealed.

On the trial plaintiff called defendant to the witness stand for the purpose of proving the execution of the note. During the examination defendant made the following

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admission in the record: "The defendant admits that the signature attached to exhibit 1 is his genuine signature, but does not admit the remainder of the instrument." Plaintiff had possession of the note and produced it at the trial. This was *prima facie* evidence of delivery and ownership. *Gandy v. Estate of Bissell*, 72 Neb. 356. This, together with the admission of the execution of the note, made a complete case for plaintiff in chief, and he rested. It is now contended that the general denial in the answer cast upon plaintiff the burden of proving that the note in suit is the identical note, in form, date and amount, that was signed by the defendant. If this contention is sound, defendant was entitled to a directed verdict when plaintiff rested. No such motion was made, but, on the contrary, defendant proceeded to develop his defenses, the principal of which was that the note in suit was not given on the day of its date, nor until the 30th day of October following, at which time, he testified, he had a settlement with plaintiff, at which the balance due plaintiff was ascertained to be \$620; that he looked at the figures on the note when he signed it, and the figures were "six and two and naught, and the two little naughts;" that he was unable to read the written portion of the note at that time, as he cannot read English. He also testified that this was done in plaintiff's house, and that no one was present at the time. In this he is directly contradicted by plaintiff and his wife, who both testify that they were present when the note in suit was signed. It will be seen, therefore, that defendant recognized the fact that plaintiff had made out a case, and that the burden was upon him to prove that the note, which he had executed and delivered, and which was regular upon its face, had been materially altered after its execution and delivery. There are cases to be found which hold that this defense cannot be shown under a general denial; but the law in this state is the other way. In *Gandy v. Estate of Bissell*, *supra*, we held that a fraudulent alteration of a note might be shown under the general issue. The fact that

such a defense may be shown under the general issue does not, however, change the rule that in making such defense, where the note is regular upon its face, the burden is upon the defendant.

This is the rule announced in *McClintock v. State Bank*, 52 Neb. 130, *Colby v. Foxworthy*, 80 Neb. 239, *Anderson v. Chicago & N. W. R. Co.*, 88 Neb. 430, and *Musser v. Musser*, 92 Neb. 387. This rule has never been departed from in this state, except in *Ohio Nat. Bank v. Gill Bros.*, 85 Neb. 718, which is strongly relied upon by defendant upon this appeal. In that case the action was upon a promissory note, and the answer a general denial. We there forsook the beaten path, and held that the burden was upon the plaintiff to show the execution and delivery of the instrument sued on, and that evidence in defense tending to show a material alteration of the note after its execution and delivery does not shift the burden of proof to the defendant. It is evident that we in that case had more in mind the doctrine of the shifting of the burden in a civil action; the rule in this state being settled that in a civil action the burden never shifts. That rule is not in conflict with the rule that, in an action upon a promissory note, which is regular upon its face, plaintiff's case is complete when he proves the execution of the note, has it in his possession, and produces it at the trial. The defense of fraudulent alteration of such note is an affirmative defense, and, like all such defenses, must be established by the one who asserts it, by a preponderance of the evidence.

In an able opinion in *Anderson v. Chicago & N. W. R. Co.*, *supra*, written by the same member of the court who wrote the opinion in *Ohio Nat. Bank v. Gill Bros.* *supra*, we returned to "the beaten path." In that action plaintiff sought to recover damages from the railroad company for unlawful discrimination in failing to furnish certain cars for the shipment of cattle from Cody, Nebraska, to South Omaha. In its answer defendant alleged that the

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only order for cars for the shipment of cattle made by plaintiff was on October 14, 1907, at which time plaintiff made and signed an order on the book kept by defendant company at Cody, in accordance with the provisions of section 10555, Ann. St. 1909. To this answer plaintiff replied by general denial. On the trial he admitted that he had signed the order. In the opinion (p. 434) it is said: "The record discloses that the written order in question bears upon its face no evidence of any change or alteration whatsoever; and, the plaintiff having admitted that he signed it, the burden of proving that it had been changed or altered after he had appended his signature thereto was upon him according to the well-settled rule which has been adopted in this state"—citing *McClintock v. State Bank* and *Colby v. Foxworthy, supra*, and *Dorsey v. Conrad*, 49 Neb. 443.

It is unnecessary to set out instructions 3 and 5 complained of. It is sufficient to say that they placed the burden upon the plaintiff of satisfying the jury by a preponderance of the evidence that the note in suit "is the identical note executed by the defendant on the 19th day of July, 1911, and that it was then a note for \$1,620." This was error for which the judgment must be, and is,

REVERSED.

ROBERT A. LENHART, APPELLEE, v. MAX L. WOLFSON,
APPELLANT.

FILED MARCH 4, 1916. No. 18592.

Landlord and Tenant: ACTION FOR RENT: EVIDENCE. The record examined, its substance set out in the opinion, and held that under the pleadings and evidence the verdict returned by the jury is the only verdict that could have been sustained.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Affirmed.*

Weaver & Giller, for appellant.

I. J. Dunn, *contra*.

FAWCETT, J.

From a judgment of the district court for Douglas county, in favor of plaintiff, for a balance due for rent of a store building in the city of Omaha, defendant appeals.

The petition alleges the leasing to defendant for one year of certain real estate known as 922 and 924 North Sixteenth street, in the city of Omaha, at an agreed rental of \$90 a month, payable monthly in advance; that defendant is in arrears for the last four months of the period covered by the lease. A copy of the written lease is attached and made a part of the petition. It shows that it was entered into May 29, 1911, for one year, beginning June 1, 1911. The answer admits that defendant entered into possession of the premises under the lease, for the stipulated rental, and payable in advance on the first of each month, as alleged in the petition. Further answering, defendant alleges that after the execution of the lease, and in the month of November, 1911, plaintiff and defendant, by mutual consent and agreement, terminated the lease, and defendant was thereby released from the obligations thereof, and all the rights and privileges thereunder were assigned by defendant, with plaintiff's knowledge, consent and acquiescence, to one Miller, who became thereunder the tenant of plaintiff; that plaintiff thereafter collected and received rents from Miller for the premises under the lease, and fully recognized and accepted Miller as his tenant thereunder. For reply plaintiff denies all of the allegations in the answer, except that plaintiff consented to Miller's occupying the premises as a subtenant of the defendant, and that plaintiff received some rent from Miller.

Two errors are relied upon for reversal: (1) That the court erred in giving instruction No. 2; (2) error in refusing to allow defendant to show that one Shaw was plain-

tiff's agent and had charge of the collection of the rents and the management of the property in controversy.

It is not disputed that no rent was paid to plaintiff for the last four months of the year covered by the lease. The record shows that in November, 1911, defendant, who was engaged in the mercantile business in the leased premises, sold his business to one Miller. His contention is that at the time he made that sale plaintiff orally agreed to take Miller as his tenant and release defendant; that on the 14th of that month he gave plaintiff a check, and indorsed on the back thereof the following: "This check is in full payment and settlement for rent and cancel of lease on said building." Under that indorsement appears the signature of plaintiff. Defendant testifies that this indorsement was on the back of the check when he delivered it to plaintiff. This plaintiff denies. Plaintiff denies that he ever released or agreed to release defendant, but that, on the contrary, he told him he would not release him, for the reason that he knew nothing about Miller, but knew that defendant was good. It further appears that later on Miller sold his stock of groceries and had them taken out of the building; that when he did so defendant attached the goods and instructed the constable to put them back in the building; that in suing out the attachment defendant filed an affidavit in which he stated that the sum of \$180 was due him from Miller for rent of the premises in controversy; that the claim was just, and that he was entitled to recover the same. The summons commanded Miller to appear at the time stated therein to answer to the action of M. L. Wolfson (defendant), "who sues to recover \$180 for rent of 922 and 924 North Sixteenth street." Miller was called as a witness for plaintiff, and testified that defendant told him in November, 1911, that Mr. Burnett would collect the rent; that both defendant and Burnett demanded the rent from him for February and March, 1912; that defendant demanded the rent from him a number of times in March, 1912; that at the trial in justice court defendant testified that Miller was

indebted to him for rent in the sum of \$180. Mr. Yale C. Holland was called as a witness, and testified that he was attorney for Miller in the litigation in justice court, and that at that trial defendant testified that Miller was indebted to him in the sum of \$180 for rent. A number of affidavits used in the justice court were introduced in evidence, in all of which defendant swore that Miller was indebted to him for \$180 rent of the premises in controversy. Defendant now seeks to escape the consequences of this assertion by him of his rights under the lease several months after the date when he claims it had been canceled, by offering to show that one Shaw was the agent of plaintiff for the collection of the rents of these premises, and that he brought the attachment suit in the justice court at the request of Shaw, for the purpose of protecting the rights of plaintiff. Shaw had departed this life prior to the time of trial. The trial court refused to permit this proof, and by instruction No. 2 instructed the jury that the only issuable fact in the case for their consideration was, "was the lease terminated by the mutual consent of the plaintiff and the defendant in November, 1911. If the said lease was terminated at that time by the mutual consent of the said parties, then plaintiff cannot recover; but, if it was not terminated, then the plaintiff would be entitled to recover the sum of \$360 and interest." As before stated, the giving of this instruction and the refusal of the court to allow defendant to show that Shaw was plaintiff's agent and had charge of the collection of the rents and management of the property in controversy are the grounds of defendant's claim for reversal. We do not think the court committed error in either instance. Under the pleadings of the parties the only question was the one which the court submitted under instruction No. 2. The proffered evidence as to Shaw was properly refused for two reasons: (1) Even if it were shown that Shaw was the agent of plaintiff for the collection of the rents and management of the property, that would not authorize him to bind plaintiff by an arrangement with a third party to institute

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an action in such party's own name for the benefit of his principal. Special authority to do anything of that kind would have to be shown. (2) To have permitted this line of proof would have been to permit the defendant to convict himself of perjury in the execution of a number of affidavits and in his testimony given on the trial in the justice court, would have permitted him now to take a position directly at variance with the position he then took and sought to sustain in a court of justice.

The record in this case, viewed from any standpoint, shows that the verdict returned by the jury was the only verdict which could have been sustained.

AFFIRMED.

**STATE, EX REL. GEORGE E. HALL, STATE TREASURER, RELATOR,
v. WILLIAM G. URE, TREASURER OF DOUGLAS COUNTY,
RESPONDENT.**

FILED MARCH 4, 1916. No. 19215.

1. **Mandamus: PUBLIC FUNDS: PAYMENTS BY COUNTY TREASURERS.** Under sections 6515 and 6516, Rev. St. 1913, the auditor of public accounts is the proper official to institute and direct legal proceedings in the name of the state for the failure of any county treasurer to make settlements with the auditor and pay over to the state treasury funds in his hands belonging to the state, when required by law to make such settlements and payments. But where demand has been made by the state treasurer upon a county treasurer for payment by the latter into the state treasury of all funds in his hands belonging to the state, at times other than the two dates fixed in section 6507, and the county treasurer admits that he has in his hands the amount of state funds demanded, so that nothing remains to be done by the county treasurer except to perform the mere ministerial act of paying over the sum so admitted, and he fails or refuses to perform such duty, the state treasurer may by mandamus compel performance.
2. **County Treasurers: STATE FUNDS: SETTLEMENTS: REASONABLENESS OF DEMAND.** Section 6507, Rev. St. 1913, examined, and *held*, that the times when county treasurers are required to pay over state

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funds in their hands are the two dates therein fixed and such other times as the state treasurer shall require. *Held*, further, that it is the duty of the state treasurer, in making demand for settlement by county treasurers at times other than the two dates fixed in the statute, to fix reasonable times for compliance with such demand, and that a demand for monthly settlements is reasonable.

3. **Mandamus: STATE FUNDS: RECEIPTS: DUTY OF STATE TREASURER.** When a county treasurer pays into the state treasury funds belonging to the state, it is the duty of the state treasurer to issue duplicate receipts therefor, file one of such duplicates in the auditors's office, and deliver the other, countersigned by the auditor, to the county treasurer making such payment; and, for his refusal to obtain and deliver such receipt, mandamus will lie.

Original proceeding in mandamus by relator, as state treasurer, to compel respondent, as county treasurer, to pay over moneys in his hands collected for the state. *Writ allowed.*

Willis E. Reed, Attorney General, and George W. Ayres, for relator.

Mahoney & Kennedy, George A. Magney and William C. Ramsey, contra.

FAWCETT, J.

This is an original action in this court by the relator as state treasurer, for the writ of mandamus to compel respondent, county treasurer of Douglas county, to pay over to relator \$170,000, which relator alleges respondent had in his hands, being moneys which had been collected by him as county treasurer prior to June 1, 1915, for the use and benefit of the state. An alternative writ was issued, returnable June 17, 1915. A hearing, quite informal in character, was had, the respondent appearing in person and by Mr. William C. Ramsey, deputy county attorney, and the relator by Mr. George W. Ayres, special assistant attorney general. At this informal hearing it was conceded by respondent that he had in his hands at the time more than the sum named by relator, but he insisted that he should not be required to pay the money over to relator for several reasons: (1) That the state treasurer was

without authority to compel a county treasurer to remit state taxes to him whenever it pleased his fancy; (2) that before a county treasurer could be required to pay money over to the state treasurer he was entitled to a statement from the auditor of public accounts, showing the amount of state taxes which the county treasurer should pay into the state treasury; (3) that as county treasurer he was entitled, when paying money over to the state treasurer, to the receipt of the state treasurer duly countersigned by the auditor of public accounts, and that the relator had uniformly refused to furnish him such a receipt; and (4) that the state treasurer was without authority to bring this action, the auditor of public accounts being the one, and the only one, duly authorized by statute to institute such proceedings. The result of the informal hearing was that the court granted a peremptory writ, ordering respondent to pay over to relator \$170,000. This writ was issued June 24, 1915, and served two days later. On June 29, 1915, by agreement of parties, the peremptory writ was vacated on condition that respondent at once pay over to relator all state funds in his hands, such payment to be without prejudice to the right of respondent to answer the alternative writ and have a hearing of the case upon the merits. Respondent complied with the condition and paid over to relator \$187,100. His answer was filed in due time, briefs were filed by both parties, and the case was submitted on the briefs and oral arguments at the bar.

It is pleasing to note that there is no question of shortage in the accounts of the respondent, nor any claim of incompetency. In the brief of counsel for relator it is gracefully conceded that the important office of county treasurer of Douglas county is "so efficiently presided over by the respondent himself." The question before us, therefore, is devoid of sentiment or sympathy, and calls for a plain determination of the duties and responsibilities of the two public officials involved, in their relations to and with each other.

The question confronting us at the threshold of the case is: Can the relator, as state treasurer, maintain this action, or should it have been brought by the auditor? Section 5546, Rev. St. 1913, declares it to be one of the duties of the auditor "to direct prosecutions in the name of the state for all official delinquencies in relation to the assessment, collection and payment of the revenue against all persons who by any means become possessed of public money or property due or belonging to the state and fail to pay over or deliver the same." Section 6515 provides: "Upon the failure of any county treasurer to make settlement with the auditor, the auditor shall sue the treasurer and his surety upon the bond of such treasurer, or sue the treasurer in such form as may be necessary, and take all such proceedings, either upon such bond or otherwise, as may be necessary to protect the interest of the state." Section 6516 provides: "Such suit shall be brought in behalf of the state in the district court of the county in which such treasurer holds office or resides, and process may be directed to any county in the state. If (In) any proceedings against any officer or person, whose duty it is to collect, receive, settle for or pay over any of the revenues of the state, whether the proceeding be by suit on the bond of such officer or person or otherwise, the court in which such proceeding is pending shall have power, in a summary way, to compel such officer or person to exhibit on oath a full and fair statement of all moneys by him collected or received, or which ought to be settled for or paid over, and to disclose all such matters and things as may be necessary to a full understanding of the case, and the court may, upon hearing, give judgment for such sum or sums of money as such officer or person is liable in law to pay."

Under these sections of the statute it is clear that the auditor is the proper official to bring an action against a county treasurer, like the one at bar, and in such action summarily compel such treasurer to exhibit on oath a full and fair statement of all moneys by him collected or received, and to disclose all such matters and things as

might be necessary to a full understanding of the case; and the court upon such hearing would have the power to give such judgment as the evidence would require. If such an action had been instituted, this court would have been relieved of much unnecessary time and labor. But, however preferable such a course might have been, was such course exclusively the one which should have been pursued? That depends upon another proposition. If the respondent, when called upon by the relator to pay over moneys in his hands, had promptly furnished the auditor full information as to the condition of his accounts by exhibiting to him his accounts and vouchers, as required by section 5547, he would have been under no obligation to turn over the money in his hands until the auditor had passed upon the statement so furnished. When the auditor had examined, adjusted and settled the account, whether by an independent investigation, or by accepting the statement of the county treasurer as correct, and fixed the amount which he should pay over to the state treasurer, nothing would remain for the county treasurer to do but to perform the mere ministerial act of transferring the state funds from his own control to that of the state treasurer; and, if he refused to perform this mere ministerial duty, we think the state treasurer could by mandamus compel performance; this upon the theory that the money had, by the forms of law, been duly found to belong to the state, and that the treasurer was entitled to have the custody and control of the same. Again, when the state treasurer makes demand upon a county treasurer to pay over state taxes collected by him, and the treasurer admits that he has in his hands, belonging to the state, moneys to the amount of the state treasurer's demand, then, so far as the custody of that particular sum of money is concerned, it is immaterial that the auditor has not made an examination, and the rule then would be the same as that above stated, viz., that the amount of the sum demanded being admitted to be state money, and in the hands of the county treasurer, that admission is equiva-

lent to an admission that the state treasurer is entitled to the custody of the money demanded. It then becomes the duty of the county treasurer to pay it over. The question as to the amount he must pay over calls for no exercise of judicial discretion or of expert ascertainment. His duty in such case, as in the other, is purely ministerial, that of delivering the sum involved to the state treasurer. That is this case. We therefore hold that the treasurer's right to maintain this action cannot be questioned by the respondent.

We come now to what we regard as the real merits of this controversy. Section 6507 provides: "The treasurers of the several counties shall pay into the state treasury all funds in their hands belonging thereto on or before the tenth day of February and the tenth day of October in each year, and at such other times as the state treasurer shall require." Section 6508 provides: "Upon ascertaining the amount due to the state from any treasurer or other person, the auditor shall give such person a statement of the amount to be paid, and upon the presentation of such statement to the state treasurer, and the payment of the sum stated to be due, the treasurer shall give duplicate receipts therefor, one of which shall be filed in the auditor's office, and entered in a book to be kept for that purpose, and the other shall be countersigned by the auditor and delivered to the person making the payment, and no payment shall be considered as having been made until the treasurer's receipts shall be countersigned by the auditor as aforesaid."

It will be seen that section 6507 expressly provides for payments by county treasurers twice a year, and it is contended by respondent that the state treasurer has no authority to call for settlements at any other time unless there exists a necessity for the state to make such call. We do not think this contention is sound. The state is not compelled to allow large sums of money to remain idle in the various county treasuries, when if it were paid into the state treasury it could be deposited in depository

banks at 3 per cent. interest, or used to pay state warrants which draw 4 per cent. This fact alone would be sufficient justification on the part of the state treasurer to call for monthly settlements by county treasurers. We agree with counsel for respondent that the state treasurer cannot make these calls at his mere whim, or at unreasonable times, as, for instance, every week, or daily, as the brief says he might do if his right to call for monthly settlements should be sustained. No such purpose on the part of the legislature can be gleaned from the statute in question, nor would the courts ever sanction such unreasonable procedure on the part of the state treasurer. Monthly settlements are not burdensome in any line of trade or commerce, and we are unable to see why they should be considered burdensome or unreasonable as applied to the business of the state. We therefore hold that the state treasurer, under the provisions of section 6507, has the right to call upon the county treasurers for monthly payments of state moneys in their hands.

When a call is made upon a county treasurer for payment of moneys in his hands, belonging to the state, what is his duty? Section 5547 answers the question, viz.: "All county treasurers, or other persons who are by law required to make settlements or pay money into the state treasury at certain specified times, shall, on or before such date, exhibit their accounts and vouchers to the state auditor, who shall, as soon as practicable, examine, adjust and settle such accounts and report to the state treasurer the balance found due the state." It may be contended that the term, "at certain specified times," refers to the times specified in the statute; but we think this is too narrow a construction. It would have been easy for the legislature to have said that the treasurer should make settlements or pay money into the state treasury at "the times specified in the statute." It did not do that, but used the language, "at certain specified times." Those times should, therefore, be construed to be the two dates fixed in section 6507, *supra*, and "such other times as the

state treasurer shall require." Giving the statute that construction, then it was the duty of the respondent, when called upon by the relator to pay over all state moneys in his hands by a certain date, to exhibit to the auditor, before such date, his accounts and vouchers for examination. We do not mean by this that it was the duty of the respondent to transport all his books and papers from his office in Omaha to the auditor's office in Lincoln for examination; but we think it was his duty to prepare a statement of the state moneys then in his hands and present that statement, with his vouchers, to the auditor. We think it is the duty of a county treasurer, when called upon by the state treasurer to make monthly payments of state moneys in his hands, to disregard anything in the demand of the state treasurer which savors of dictation or assumption of powers which do not belong to him, and to proceed in good faith to comply with the requirements of the statute by promptly sending to the auditor a statement of the moneys in his hands which would be subject to the demand so made. He cannot fail to do that and then justify his refusal on the ground that the auditor has not performed the duty imposed on him by statute. We think a fair construction of section 5547, *supra*, imposes upon the county treasurer the duty of making the first move in the making of such settlement by exhibiting to the auditor his accounts and vouchers as therein stated. This the respondent failed to do.

Another claim by respondent is that, under the provisions of section 6508, which provides that, when payment is made by a county treasurer to the state treasurer, the latter shall give duplicate receipts therefor, one of which shall be filed in the auditor's office, and the other countersigned by the auditor and delivered to the county treasurer making the payment, he is not required to make payment until he is furnished such receipt, for the reason that the section of the statute just referred to further provides, "and no payment shall be considered as having been made until the treasurer's receipts shall be countersigned by

the auditor as aforesaid." The respondent shows, and the showing is not disputed but in fact is conceded, that prior to the commencement of this action the relator had at all times refused to give him a receipt countersigned by the auditor. Relator contends that it is the duty of a county treasurer to pay over the state moneys, obtain his duplicate receipts, and himself take them to the auditor and file one, and have the other countersigned; while the respondent contends that it is the duty of the state treasurer to file one of the duplicate receipts in the auditor's office, procure the other to be countersigned by the auditor, and deliver such countersigned receipt to the county treasurer. We think the contention of the respondent is sound on this point. He is not required to bring the money with him to the state treasurer's office and pay it over. Under the provisions of section 6507, *supra*, the sum so paid by the county treasurer to the state treasurer "shall be the identical state warrants if any received by the treasurer for payment of the taxes, or in coin or in treasury notes of the United States." In addition to this, it appears from the record before us that, when the relator made his demand upon the respondent, he advised him that he could "make such remittances by bank draft or some form of exchange which is payable at face value in Lincoln or Omaha." When, therefore, state funds are remitted to the state treasurer by a county treasurer, by either of the methods prescribed in the statute, or in the treasurer's demand, it is his duty to send to the remitting treasurer a receipt duly countersigned by the auditor. If he refuses to send such a receipt, mandamus will lie to compel him to do so. In like manner, if the auditor, in a proper case, should refuse to countersign such receipt, mandamus would lie to compel him to perform that duty. The relator now recognizes the fact that that duty rests upon him, and when respondent made the payment, hereinbefore referred to, relator sent him such a receipt, and in the brief of the attorney general, on behalf of the relator,

it is stated, in substance, that there will be no further refusal to perform that duty.

In the light of what we have said, we think the peremptory writ issued on June 24, 1915, was properly issued, and, such writ having been vacated for the purpose of the present hearing, it is ordered that it shall again issue; each party to pay one-half of the costs.

WRIT ALLOWED.

SEDGWICK, J., concurring.

Since the county treasurer admits in his return to the writ that he has the money of the state in his hands as alleged in the writ, and that a demand for the same has been made by the state treasurer, I think the money should be transferred from the county treasury to the state treasury, and that the duty to see that it is done devolves upon the state treasurer, who can maintain this action for that purpose.

I do not think that section 6507, Rev. St. 1913, contemplates that the state treasurer shall by general order require monthly settlements by county treasurers in addition to the semi-annual settlements which the section requires. This construction of the statute places a burden upon the auditor not contemplated by the statute. The section relates only to payment of state funds into the state treasury. When, as in this case, it is conceded that a county treasurer has a large amount of state funds in his hands, the state treasurer may require that it be paid into the state treasury. No formal settlement with the county treasurer is necessary in such case.

Section 6508 relates to the semiannual settlements required by the statute. When upon such settlements the auditor has determined the amount due, he gives the county treasurer a statement of the amount. The county treasurer presents this statement with the money to the state treasurer, and he "shall give duplicate receipts therefor." These duplicate receipts are not evidence protecting the county treasurer unless he files one of them with the

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state auditor and procures him to countersign the receipt retained by the county treasurer. The county treasurer is the only one interested in having this receipt conclusive that payment has been made, and he cannot obtain a valid receipt unless he presents the duplicate receipts which the state treasurer is required to give, and procures the auditor to countersign his receipt. Thus it is made certain that the auditor will have official notice of the payment by the county treasurer. If the county treasurer sees that this is done, he will have a good receipt, otherwise not. If he leaves it to some other person to present to the auditor the duplicate receipts which the state treasurer gives, he assumes the risk of having no legal evidence of the payment he has made.

EMIL MUZIK V. STATE OF NEBRASKA.

FILED MARCH 4, 1916. No. 19362.

1. **Criminal Law: EVIDENCE: EXHIBITS.** *McKay v. State*, 90 Neb. 63, and *Flege v. State*, 93 Neb. 610, examined, and *held*, that the rule announced in paragraph 7 of the syllabus in the former, and in paragraph 3 of the syllabus in the latter, does not, and was not intended to apply to facts or exhibits which tend to prove or disprove the guilt or innocence of the accused, or his sanity, or the degree of his crime.
2. ———: **INSTRUCTIONS: INSANITY.** Instruction No. 15, examined and considered in the opinion, criticized as to form, but *held* to have fairly presented to the jury the law relating to the defense of insanity as applied to the evidence introduced at the trial.
3. **Homicide: SUFFICIENCY OF EVIDENCE: REDUCTION OF SENTENCE.** The evidence examined, its substance set out in the opinion, and *held*, sufficient to sustain the verdict of guilty of murder in the first degree, but insufficient to sustain the imposition of the death penalty.

ERROR to the district court for Douglas county: JAMES P. ENGLISH, JUDGE. *Sentence reduced.*

J. E. Bednar and W. W. Hoyer, for plaintiff in error.

Willis E. Reed, Attorney General, and Charles S. Roe, contra.

FAWCETT, J.

Plaintiff in error, whom we will designate as defendant, was convicted in the district court for Douglas county of murder in the first degree. The jury fixed the penalty of death, and sentence was pronounced accordingly. Defendant prosecutes error.

The assignments of error are: (1) The giving of instruction No. 15; (2) error in overruling defendant's motion for a new trial; (3) that the verdict is not sustained by sufficient evidence, is excessive, and was the result of passion and prejudice on the part of the jury.

The second assignment will first be considered. It is divided into three subheads, which are discussed together in the brief. The victim of defendant's deed was his wife. The crime was committed on the morning of March 5, 1915, and before Mrs. Muzik was fully dressed. The evidence shows that defendant at one time had been employed in the packing houses of South Omaha, but for more than a year preceding the tragedy had done no work of any kind; that Mrs. Muzik was earning the support of the family by her own labor. On the morning in question she chided the defendant for not getting up and starting a fire sooner, as she had to get to work. We give her own statement to her neighbor, Mrs. Smith, immediately after the tragedy. Mrs. Smith testified that about a quarter to 7 in the morning Mrs. Muzik came to her home carrying her child in her arms; that after she opened the door she "hollered;" that witness ran to meet her; that she was dressed only in her underwear, and had on one stocking and slipper, with a coat thrown around her. "She started to holler and call my name, call 'Mrs. Smith,' and I asked her what is the matter, and she says, 'Oh, my, Muzik cut me; cut my throat.' I says, 'Why?' * * * She says, 'I don't know.' I says, 'Did you have

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a quarrel?" 'No,' she says, 'I just told him why don't he get up and start a fire sooner; I have to get to work.' And she says, 'He took me and put me on the floor and took a knife and cut me.'" The witness was then asked to describe the appearance of Mrs. Muzik at that time. In doing so she told how the blood was oozing through a cloth that she had around her neck, and how it had run down over her garments. Her testimony shows that Mrs. Muzik presented a decidedly bloody appearance. Other witnesses, who immediately visited the scene of the tragedy, described the condition and appearance of the room in which the deed was committed. This description was more or less graphic, one witness stating that it resembled a slaughter house. The knife with which the deed was committed was also introduced in evidence and exhibited to the jury. It was a thin-bladed, steel table knife, with a sharp edge, and was covered with blood.

In the opening statement to the jury at the beginning of the trial counsel for defendant admitted that defendant killed his wife, and urged insanity as his defense. It is now contended that, inasmuch as the killing was admitted, the testimony with regard to the bloody condition of Mrs. Muzik and the similar condition of the room where the deed was committed and the exhibition of the knife could serve no purpose in the case except to inflame the passions and excite the prejudices of the jury, and that under the rule announced in *McKay v. State*, 90 Neb. 63, and *Flege v. State*, 93 Neb. 610, their admission was prejudicial error. The rule announced in those cases is that in a criminal prosecution an accused is entitled to a trial upon competent, relevant evidence, evidence which at least tends to establish his guilt or innocence, and that evidence which has no such tendency, but which, if effective at all, could only serve to excite the minds and inflame the passions of the jury, should not be admitted. There is a clear distinction between those cases and the case at bar. In each of those cases there was no doubt that a deliberate, cold-blooded murder had been committed, and the only

question was the identity of the slayer. In the case at bar there was no question as to the identity of the slayer, but the questions before the jury were his sanity and the degree of his crime. The nature of the crime, the conditions surrounding it, the appearance of the parties, the kind of instrument used, would all tend to throw light upon the two important questions: First, was it a deliberate, premeditated killing which would make it murder in the first degree; and, second, was it made by one who was sane, or did it appear to be the work of an insane person? The rule announced in the *McKay* and *Flege* cases does not, and was not intended to, apply to a case like the one at bar.

Under the first assignment, numerous objections are made to instruction No. 15. These objections, while skillful, are hyper-technical to a degree which, while they might have availed in former years, no longer meet with favor in the appellate courts of the land. While it must be conceded that the instruction is considerably involved in its statement—so much so that we cannot commend its form and want of clearness—yet we are all agreed that, under the facts in this case, we cannot hold that it constitutes prejudicial error. Taken as a whole, we think it fairly presented to the jury the law relating to the defense of insanity generally, and particularly so under the evidence in this case. We are unable to see how the jury could have listened to it as it was read to them from the bench, or have examined it after retiring to deliberate on the case, without fully understanding that it imposed upon the state the burden of overcoming the evidence offered by the defendant to rebut the presumption of sanity by evidence establishing beyond a reasonable doubt that the defendant was, at the time of the commission of the offense with which he was charged, possessed of a mind that at such time discerned between moral right and wrong with reference to his act, and that at such time he did know the nature and quality of his act.

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Was the evidence sufficient to sustain the verdict, and is the verdict so excessive as to show passion and prejudice on the part of the jury? As has already been stated, the killing was admitted, so that the only question really to be considered under this assignment is whether the verdict is so excessive as to show passion and prejudice. That it was a brutal murder is not denied; but it is urged that the defendant was insane at the time. The evidence on this point, briefly stated, is that after he quit working in the packing houses, more than a year prior to the tragedy, defendant remained in the house constantly, or so nearly so that his nearest neighbors never saw him outside but once or twice during that time. He would sit apparently musing, and would draw the blinds, either to shut out the light or to avoid observation from outsiders. Mrs. Muzik worked in a restaurant, and would bring his meals to him. The little seven-year-old daughter testified: "He cut my mamma's throat. Q. And what else did he do after he did that? A. He clapped his hands and ran outdoors. * * * He laughed and he clapped his hands." The testimony of those who knew the defendant as to his actions prior to the tragedy and to his actions and conversation immediately afterward, and the testimony of the chief of police, who had him in custody from the time of the tragedy until his victim died two days later, so clearly sustain the verdict of the jury finding the defendant guilty of murder in the first degree that we cannot set it aside.

We are, however, impressed with the conviction that the death penalty should not be imposed. There is enough in the evidence to show that, while the defendant understood and comprehended the nature of the deed committed, and understood and comprehended the difference between right and wrong, his mind was nevertheless abnormal. According to the statement of Mrs. Muzik immediately after the tragedy, he had several times threatened to kill her. It may be said that this was proof of premeditation; and so it would be in the case of a normal mind, but in the

present case it has some tendency to show an abnormal mind which for more than a year had been brooding over actual or fancied troubles. The defendant was in good health, able to work, and, up to the time that he voluntarily imprisoned himself in his own home, he had, so far as the evidence shows, performed his duties as a husband and father to his wife and child. It is hard to conceive of a man who is absolutely normal in all respects acting as the evidence shows the defendant acted during the last year or more before he committed this horrible crime. *Hamblin v. State*, 81 Neb. 148, 168, in many respects presents a similar situation to the one at bar. We there stated that a solution of the motive which prompted the act was an impossibility; that we were fully persuaded that the defendant should never be given his liberty, for the reason that he would be a menace to those with whom he might associate. In this case, as in that, the evidence tends strongly to convince us that, owing to defendant's mental condition, "there may be grave doubts as to his responsibility for his acts at the time of the tragedy, and yet he is neither an idiot, an imbecile, nor a maniac. We can find no justification for taking his life, nor should he ever be discharged from confinement."

Upon a grave consideration of the whole record, we feel constrained to hold that this case comes within section 9179, Rev. St. 1913, which provides that in all cases pending in this court on error we may reduce the sentence rendered by the district court when in our opinion the sentence is excessive, in which case it is made our duty to render such sentence against the accused as in our opinion may be warranted by the evidence. Acting under the wise provision of that statute, the verdict of the jury in the district court, finding the defendant guilty of murder in the first degree, is affirmed, but that part of the verdict fixing the penalty at death and the judgment of the district court imposing the death penalty are reduced to life imprisonment.

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The judgment of this court, therefore, is that the defendant be imprisoned in the state penitentiary at hard labor during his natural life, but without solitary confinement. As thus modified, the judgment is affirmed.

SENTENCE REDUCED.

LETTON and HAMER, JJ., not sitting.

HINDS & LINT GRAIN COMPANY, APPELLANT, v. FARMERS
ELEVATOR COMPANY, APPELLEE.

FILED MARCH 4, 1916. No. 18222.

1. **Principal and Agent: SPECULATIONS OF AGENT: LIABILITY OF BROKERS.**
If a corporation owning an elevator in this state puts an agent in charge of the elevator to buy grain and ship the same to market, and instructs the agent not to speculate in grain, and the agent pays to brokers the money of his principal to be used in gambling speculations, such brokers who take and so use the money with knowledge of the facts will be liable to the owner thereof.
2. **Set-Off.** The claim of the corporation for money so wrongfully paid by the agent to the broker is in the nature of an action for money had and received and is a proper subject of set-off in an action on contract.

APPEAL from the district court for Otoe county:
HARVEY D. TRAVIS, JUDGE. *Affirmed.*

Charles S. Roe and A. A. Bischoff, for appellant.

Livingston & Heinke, contra.

SEDGWICK, J.

The plaintiff is a firm engaged in dealing in grain in Kansas City, Missouri. The defendant is a corporation under the laws of this state, and owns an elevator at Burr, Nebraska, and was engaged there in buying and shipping grain. The defendant employed one Beckman, who had

the management of defendant's business at Burr in buying and shipping grain. The plaintiff alleged that it contracted grain from the defendant which the defendant refused afterwards to deliver, and asked to recover the difference between the purchase price of the grain and the value of the grain at the time of the agreed delivery. The defendant alleged that its agent Beckman, without the knowledge of the defendant, and wrongfully, engaged in gambling contracts of speculation through this plaintiff, and that the plaintiff applied some of the proceeds of the defendant's grain upon the settlement of its gambling contracts with the defendant's agent; and also as a second claim that the defendant's agent wrongfully and without the consent of the defendant paid to the plaintiff, on account of said gambling contract, money belonging to the defendant, and that the plaintiff received the same with notice that the said agent was without authority to use the defendant's money for said purpose. The trial court found the plaintiff's claim against the defendant to be as alleged, and found in favor of the defendant on its two claims against the plaintiff, and entered a judgment in favor of the defendant for the balance so found. The plaintiff has appealed.

The plaintiff contends that there is not sufficient evidence to justify the finding that the plaintiff appropriated the proceeds of the defendant's claim upon its dealings with the defendant's agent, but this contention does not appear to be much discussed in the briefs. The principal contention of the plaintiff appears to be that the defendant's claim is not a proper subject of set-off. The evidence shows that the capital stock of the defendant company was \$5,000, and that the highest amount of indebtedness it could incur was two-thirds of its subscribed capital stock; that the by-laws of the defendant company provided: "No officer, employee, or member of this corporation shall be allowed to speculate in grain, or other commodities, using the seal of the corporation therefor." The evidence also shows that the agent was in fact speculating in grain

on his own account; that none of the officers of the defendant company had any knowledge or notice of such transaction on the agent's part; that the agent from time to time financed his gambling deals with the plaintiff by drawing the company's checks in favor of the plaintiff. Each of these checks had the following notice indorsed on the back: "Banks will please note: Not payable unless the following instructions are strictly adhered to: Must be filled out in ink, and must be signed by our agent, and must be payable for grain only. Gross, tare and net pounds to be noted. Price per bushel must be noted." On the left of the face of the check were the words: "This stub must not be detached from check." The stub attached to the check contained the words: "Agents must fill out this space"—followed by blanks indicating that the kind of grain for which payment was made should be stated on the stub, the gross weight of the grain, tare, and net weight, and the number of bushels and price per bushel. There can be no doubt that the plaintiff had ample notice that the agent was transcending his authority and was using the money of the defendant without any authority to do so. Under such circumstances the plaintiff was liable to the defendant for this money so appropriated by it, under the well-established rule of this state. *Mendel v. Boyd*, 3 Neb. (Unof.) 473; *Farmers Co-operative Shipping Ass'n v. Adams Grain Co.*, 84 Neb. 752. The defendant had no part in the illegal transaction of the plaintiff. The plaintiff took the defendant's money without authority, and the defendant's claim is in the nature of an action for money had and received, and is a proper subject of offset.

The judgment of the district court is

AFFIRMED.

LETTON, J., not sitting.

STATE OF NEBRASKA, APPELLEE, v. EDWARD L. TEMPLE,
APPELLANT.

FILED MARCH 4, 1916. No. 18402.

1. **Municipal Corporations: POWERS.** "A municipal corporation possesses only such powers as are expressly conferred upon it by statute, or are necessary to carry into effect some enumerated power." *State v. Irey*, 42 Neb. 186.
2. ———: **BOARD OF HEALTH: POWERS: SLAUGHTERHOUSE.** The board of health of a city of the second class having more than 1,000 and less than 5,000 inhabitants has no jurisdiction to provide by "regulation" that to keep and maintain a slaughterhouse outside of the city is a crime, and fix the punishment therefor to be enforced by criminal prosecution.
3. ———: ———: **REGULATIONS: VALIDATION BY ORDINANCE: SLAUGHTERHOUSE.** An ordinance of a city of the second class having more than 1,000 and less than 5,000 inhabitants, which gives the mayor "jurisdiction and with authority over all places and territory within the limits of said city and within five miles thereof to enforce the rules, regulations and ordinances of the board of health of said city," does not give validity to a "regulation" of the board of health which attempts to make it criminal to maintain a slaughterhouse outside of the city, and to provide a punishment therefor.
4. **Quære.** Whether the mayor and council of such city can by ordinance make it criminal to maintain such slaughterhouse is not decided.
5. **Municipal Corporations: BOARD OF HEALTH: POWERS: SLAUGHTERHOUSE.** Section 5015, Rev. St. 1913, does not confer upon the board of health, authorized thereby, power to adopt a "regulation" making it criminal to maintain a slaughterhouse outside of the city, and providing punishment therefor by criminal prosecution.
6. ———: ———: ———: ———. Section 5017, Rev. St. 1913, does not authorize the board of health to make and enforce such "regulation."
7. ———: ———: ———. Section 5106, Rev. St. 1913, which confers certain powers upon villages and cities of the second class, does not extend those powers to the board of health.
8. **Nuisance: INJUNCTION: PARTIES.** To keep and maintain a nuisance is made criminal by section 8845, Rev. St. 1913, and this ap-

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plies to all common law nuisances. A nuisance may be enjoined in equity, and such action may be maintained by a city of the second class or a village.

APPEAL from the district court for Howard county:
JAMES N. PAUL, JUDGE. *Reversed and dismissed.*

E. P. Clements and Frank J. Taylor, for appellant.

T. T. Bell, contra.

SEDGWICK, J.

The board of health of the city of St. Paul adopted regulation No. 1, "to secure the general health and to prevent nuisances within the limits of said city, and providing penalties." Among many other things, this regulation recited: "It shall be unlawful for any person to erect, keep or maintain any slaughterhouse within the limits of the city of St. Paul, or within one hundred and thirty (130) rods outside the city limits on the east, and 160 rods outside of the city in all other directions; and no slaughterhouse shall be kept or maintained within 20 rods of any dwelling house or public traveled road at any place within one mile of said city limits." A complaint was filed in the police court of the city charging that this defendant did unlawfully maintain a slaughterhouse "within 130 rods of the east corporate line of said city, to wit, within 35 rods thereof." He was found guilty in the police court, and appealed to the district court for Howard county, where he was tried by the court without a jury, and again found guilty and sentenced to pay a fine and the costs of prosecution. The defendant has brought the case to this court for review and assigns several grounds for reversal; the principal one being that the regulation of the board of health is void for want of jurisdiction or power to make it. "Any fair, reasonable doubt concerning the existence of power (of the city itself) is resolved by the courts against the corporation, and the power is denied.

* * * These principles are of transcendent importance, and lie at the foundation of the law of municipal corporations." 1 Dillon, *Municipal Corporations* (4th ed.) sec. 89. "A municipal corporation possesses only such powers as are expressly conferred upon it by statute, or are necessary to carry into effect some enumerated power." *State v. Irey*, 42 Neb. 186.

The prosecution relies upon sections 5006, 5015, 5017, 5106, Rev. St. 1913. Section 5006 provides: "The mayor shall have such jurisdiction as may be vested in him by ordinance, over all places within five miles of the corporate limits of the city, for the enforcement of any health or quarantine ordinance and regulation thereof, and shall have jurisdiction in all matters vested in him by ordinance, excepting taxation, within one-half mile of the corporate limits of said city." The mayor and council enacted an ordinance that the mayor be and "he is hereby vested with jurisdiction and with authority over all places and territory within the limits of said city and within five miles thereof to enforce the rules, regulations and ordinances of the board of health of said city, and the quarantine ordinances and regulations of said city, city council and board of health." It seems to be contended that this ordinance is a recognition of the jurisdiction and power of the board of health to make the regulation in question, and would therefore give some force and effect to that regulation as an ordinance of the city. It is not necessary to determine in this case whether the mayor and council of a city of the second class having more than 1,000 and less than 5,000 inhabitants have jurisdiction by ordinance to prohibit slaughterhouses outside of the city limits and within five miles of the city. Whatever may be thought of the power of the mayor and council in that regard, it is manifest that this ordinance was not intended, and could not have the effect, to give vitality and force to the regulation of the board of health in the matter in question.

Section 5015, Rev. St. 1913, gives the mayor and council of the city power "to make regulations to prevent the in-

troductiion of contagious or infectious diseases into the city, to make quarantine laws for that purpose and to enforce the same within five miles of the city; to create and establish a board of health to consist of the mayor, who shall be chairman, the city physician, who shall be secretary, the president of the city council and the marshal of such city." It then contains the provision: "A majority of such board shall constitute a quorum to enact ordinances for the enforcement of all rules, regulations and orders of said board, and provide fines and punishments for the violation thereof." There is no doubt that the legislature could authorize a municipal corporation to enact suitable ordinances for the government of the city and "provide fines and punishments for the violation thereof." It may well be doubted whether the legislature could confer such power on the board of health. However that may be, it is manifest that it is not the purpose of this section to confer such power as the board of health has undertaken to exercise in the regulation in question. The section relates to quarantine and the prevention of contagious and infectious diseases in the city. The legislature could not have intended to empower a board of health to define and provide punishments for crimes committed outside of the city. If such board could be given such powers and could exercise them outside of the city, by the same reasoning they could exercise them anywhere within five miles of the city limits, which, of course, was never intended by the legislature.

Section 5017 gives the city the general power "to make regulations to secure the general health of the city, and to prevent and remove nuisances, and to provide the city with water," and has no relation to the question before us.

Section 5106 gives to villages and cities with less than 5,000 inhabitants power "to make all such ordinances, by-laws, rules, regulations and resolutions not inconsistent with the laws of the state, as may be expedient, in addition to the special powers in this chapter granted, for maintaining the peace, good government and welfare of

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the corporation, and its trade, commerce and manufactories, and to enforce all ordinances by inflicting fines or penalties for the breach thereof, not exceeding one hundred dollars for any one offense, recoverable with costs, and in default of payment to provide for confinement in prison or jail, and at hard labor upon the streets or elsewhere for the benefit of the city or village." It does not relate to the power conferred upon boards of health.

Section 8845, Rev. St. 1913, makes it unlawful to erect, keep up or continue and maintain any nuisance, and has been held to make all common-law nuisances crimes. *State v. DeWolfe*, 67 Neb. 321. It has also been held that a nuisance may be enjoined in equity. *Todd v. City of York*, 3 Neb. (Unof.) 763. A village may maintain such action. *Village of Kenesaw v. Chicago, B. & Q. R. Co.*, 91 Neb. 619. We do not mean to be understood as holding that the mayor and council of a city cannot by ordinance prevent the maintenance of a slaughterhouse in the vicinity of a city of this class. That question is not involved in this case. The regulation of the board of health under which this defendant was prosecuted is invalid.

The judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

LETTON, J., concurs in the conclusion.

ROSE, J., dissents.

AGNES JACQUITH, APPELLEE, v. EDGAR H. MASON, ADMINISTRATOR, ET AL., APPELLANTS.

FILED MARCH 4, 1916. No. 18469.

1. **Corporations: OFFICERS: TRUST RELATION.** The president of a corporation, who is also a director and stockholder, is not only the agent of the corporation, but is also in many respects a trustee for the stockholders as such.

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2. ———: ———: LIABILITY. It is the duty of such president and manager of the corporation, who learns that the entire stock of the corporation can be sold at a certain favorable price, and disposes of his own stock accordingly, to inform other stockholders, who he knows are anxious to dispose of their stock, and if he fails to do so, but purchases their stock at a less price and immediately sells it at a profit, he will be liable to such stockholder for the profit so realized.
3. ———: ———: ———. In such case one who, with knowledge of all the conditions, joins with such president in purchasing the stock and realizing profit thereon will be also liable.
4. Evidence indicated in the opinion is found sufficient to support the findings and judgment.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Affirmed.*

Duncan M. Vinsonhaler and Gurley, Woodrough & Fitch, for appellants.

McGilton, Gaines & Smith, contra.

SEDGWICK, J.

Some time prior to October, 1909, this plaintiff, being the owner of 201 shares of the face value of \$100 each of the capital stock of the Underwriters Insurance Company, placed the same in the hands of Burns, a stock broker, for sale. Afterwards Burns sold the stock for \$75 a share. Soon afterwards, the stock was sold to one Montgomery for \$110 a share. Plaintiff began this action in the district court for Douglas county against William C. Sunderland and Sherman Saunders, alleging that Sunderland was a stockholder, director and president of the Nebraska Underwriters Insurance Company, and that he, acting through and joining with Saunders, fraudulently purchased the plaintiff's stock for \$75 a share to enable them to transfer the whole capital stock to Montgomery at \$110 a share. She asked for a judgment against the defendants for the difference between \$75 and \$110 a share. Sunderland answered that the facts in the petition failed to state a cause of action against him, coupled

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with a general denial of all the allegations in the petition. Saunders denied generally all of the allegations of the petition. While the action was pending, both Saunders and Sunderland died, and Maria B. Sunderland, executrix, was substituted for the defendant Sunderland, and Edgar H. Mason, as administrator, was substituted for the defendant Saunders. The trial in the district court resulted in a verdict and judgment in favor of the plaintiff for the amount asked for, \$7,035 and interest, amounting to \$8,020.13.

The defendants contend that the evidence is not sufficient to support the verdict; that the verdict and judgment are contrary to law, and that the court erred in certain instructions given to the jury.

The briefs are not a compliance with rule 12 (94 Neb. XI). The parties do not agree as to the evidence, and, in making their respective statements as to the substance of the evidence, they do not always refer "with particularity by question and page to the evidence in the record supporting the contention made." The latter part of the rule, relating to the statement of the propositions of law relied upon and the authorities supporting them, is not carefully observed.

Sunderland and Saunders were partners, carrying on a business distinct from that of the insurance company. The plaintiff's husband was recently deceased, and in his lifetime he had been the owner of this stock and somewhat interested in the affairs of the company, and for several years no dividend had been paid to the plaintiff on her stock. This was all the information that the plaintiff had in regard to the probable value of the stock, and because she was receiving no dividends thereon she thought it was necessary to sell the stock. She authorized the broker to sell it at \$75 a share. She testified that some time before the transaction complained of she had conversation with the president, Sunderland, in regard to the dividends, but was given no information in regard to the condition of the company nor the probable value of the

stock. Mr. Montgomery had some stock in the company, and, together with his partner, Funkhauser, was largely interested in a rival company. It would appear that from the evidence the jury might have found that the defendant Sunderland on the 8th of October, 1909, went to the office of Montgomery and Funkhauser, in Chicago, with a view to negotiation as to the capital stock of the insurance company, and learned that Montgomery would purchase the entire stock of the Underwriters Insurance Company and pay \$110 a share therefor, and that thereupon Sunderland contracted his stock at that price. It was not inconsistent with the evidence that he gave Montgomery to understand that the remainder of the stock could also be purchased at that price, and that it was because of that understanding that he was able to sell his own stock. A few days later, after Mr. Sunderland's return, Mr. Love, who was an acquaintance of Sunderland and Saunders and had some stock in the insurance company, contracted with the broker Burns for the plaintiff's stock at \$75 a share. The plaintiff thereupon signed a blank assignment of the stock and delivered it to Mr. Love, and the stock was afterwards found to be assigned to Mr. Saunders and to be on deposit in the United States National Bank of Omaha, as collateral security for the sum of \$15,000, about the amount that was paid for the plaintiff's stock. Afterwards Mr. Saunders, within a few days, sold the stock to Montgomery.

The defendants contend that the evidence will not warrant the finding that Sunderland and Saunders were interested in the purchase of plaintiff's stock. Mr. Love testified that he was himself trying to get a controlling interest in the company, and evidently desired the jury to believe that he bought plaintiff's stock with that in view, and that when he found he could not succeed in getting a controlling interest in the company he sold a one-half interest in the stock to Mr. Saunders for the price that he had paid plaintiff. He testified that he sold a half interest in the stock to Saunders, and said that he would have

been "stuck" if "they" had not bought the stock from him, indicating that some third party was interested in the deal. Mr. Saunders' testimony is inconsistent with the idea that Love alone bought the stock for his personal interest. Saunders testified: "Q. That is, before the 14th of October, you and Mr. Love were entering into negotiations for the purchase of the stock of the Nebraska Underwriters Insurance Company? A. Yes, sir. Q. You were acting together in the matter? A. Yes, sir. Q. And this stock was purchased from Mrs. Jacquith, in which you and Mr. Love were together in that transaction? A. Yes, sir. Q. And while you didn't furnish, at the time, one-half of the money, you became obligated, and furnished your half of it? A. Yes, sir." There is direct evidence that Mr. Sunderland stated that himself and Love and Saunders had planned together to buy the whole stock of the company, and there are many circumstances in the evidence indicating that when Sunderland learned that the entire stock could be sold to Montgomery for \$110 a share he communicated this fact to his business partner, Saunders, and they through Mr. Love procured the plaintiff's stock with the purpose of selling it to Montgomery with Sunderland's own stock. The books of Sunderland and Saunders show that Sunderland participated in the profits that were realized on the plaintiff's stock.

It is insisted: "The defendant Sunderland might have lawfully purchased the plaintiff's stock himself or through an agent or in any other manner, regardless of his information at the time of purchase, so long as he was not guilty of actively misleading her in respect thereto." This court in *Barber v. Martin*, 67 Neb. 445, stated the following as a general proposition of law: "The general manager of a corporation, in effectuating a sale of the entire capital stock of his company, acts as the agent of all the stockholders, and he cannot receive and retain a secret compensation from the vendee for effectuating the con-

tract of sale." This is a little stronger than was necessary under the facts in that case. It appears that the trial court had instructed the jury: "You are instructed that the sole questions for you to determine in this case from the evidence are: (1) Did the defendant Barber in selling said 18 shares of stock which originally belonged to the plaintiff act as her agent and representative? If he did not, you need not consider the case any further, but return a verdict for defendant." If this instruction was not strictly accurate in view of the facts developed in that case, the error, if any, was prejudicial to the plaintiff, and not to the defendant, and so it may justly be said that, so far as the consideration of that case is concerned, the instruction was not erroneous, requiring a reversal.

The supreme court of Kansas has had occasion to discuss quite at large a similar question, and declares the law to be: "The managing officers of a corporation are trustees not only in relation to the corporate entity and the corporate property, but they are also, to some extent and in many respects, trustees for the corporate shareholders. * * * The fact that the directors and managing officers of a corporation are quasi-trustees for the stockholders does not prohibit them from dealing with the latter. The only restriction is that in such dealing their conduct be fair, open, and above reproach. Because of the trust relation and the better opportunity afforded for acquiring information, before any director or managing officer of a corporation, having a knowledge of the condition of its affairs, can rightfully purchase the stock of one not actively engaged in the management, he must inform such stockholder of the true condition of affairs." *Stewart v. Harris*, 69 Kan. 498. As applied to the facts in that case, the court approved of the following language in the instructions of the trial court: "You are instructed that the president, or other managing officer of a corporation doing business as a bank, stands in relation of a trustee to all the stockholders who are not themselves engaged in the entire management of the bank, and, be-

fore any managing officer of a bank who is acquainted with its condition and affairs can rightfully purchase the stock of such bank from stockholders who are not actively engaged in the management and operation of the bank, such managing officers must inform such stockholders of the true condition of the bank and its affairs and assets, and must give to such stockholders all the information affecting the value of the stock which such managing officer himself possesses." In the opinion the court referred to the case of *Board of Commissioners of Tippecanoe County v. Reynolds*, 44 Ind. 509, 15 Am. Rep. 245, as the leading authority holding a contrary view. The fact that that decision was rendered by a divided court was mentioned, and it was then said: "The rule laid down has met with much criticism. The position taken leaves the stockholders' interest in the corporation and all matters affecting its value wholly in the charge and keeping of the managing officers of the corporation, and leaves the stockholders their legitimate prey. We cannot give the sanction of our approval to the views they expressed."

Other courts have refused to state the rule as strongly for the plaintiff as this. The supreme court of Georgia considered a case in one respect more nearly identical with the case at bar. That court declared the rule to be: "Where a director purchases shares from a stockholder at 110, concealing the fact that there is a contemplated sale of the entire plant of the company, which makes the stock worth 185, the concealment of such material fact entitles the shareholder to rescind the sale, or to other appropriate relief." *Oliver v. Oliver*, 118 Ga. 362. Mr. Justice Lamar in the opinion of the court discusses very clearly the relation which a director bears to any regular stockholder: "But the fact that he is trustee for all is not to be perverted into holding that he is under no obligation to each; the fact that he must serve the company does not warrant him in becoming the active and successful opponent of an individual stockholder with reference to the latter's undivided interest in the very property committed to the direc-

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tor's care. * * * No process of reasoning and no amount of argument can destroy the fact that the director is, in a most important and legitimate sense, trustee for the stockholder. *Jackson v. Ludeling*, 21 Wall. (U. S.) 616; 2 Pomeroy, *Equity Jurisprudence* (2d ed.) sec. 1090. Not a strict trustee, since he does not hold title to the shares; not even a strict trustee who is practically prohibited from dealing with his *cestui que trust*; but a quasi-trustee as to the shareholder's interest in the shares. * * * If, however, the fact within the knowledge of the director is of a character calculated to affect the selling price, and can, without detriment to the interest of the company, be imparted to the shareholder, the director, before he buys, is bound to make a full disclosure. In a certain sense the information is a quasi-asset of the company, and the shareholder is as much entitled to the advantage of that sort of an asset as to any other regularly entered on the list of the company's holdings."

If the jury in the case at bar believed that the president and manager of the corporation had found an opportunity to dispose of all the stock of the corporation at a price beyond its supposed value, and had disposed of his stock at that price, knowing that the purchaser expected to take all of the remaining stock, and through his partner and a third person procured the stock of the plaintiff at a much less price with the purpose and intention of disposing of the same as he had already disposed of his own, knowing at the time that the stockholder from whom he so purchased was not familiar with public transactions, was wholly unacquainted with the condition of the corporation, the value of the stock or the opportunity to sell the same, the jury would be justified in finding a verdict for the plaintiff.

The objection that the stock was not really worth more than the plaintiff obtained for it does not appear to have any merit. The condition was the same as though the president had ascertained that the property of the company could be sold at such a price as to make the value

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of the stock at \$110 a share. The defendant knew that the stock could be sold for that amount, and apparently it was upon the understanding that all of the stock would be so sold that the defendant was enabled to make so advantageous a sale of his own stock.

There is perhaps a slight variance between the allegations of the petition as amended and the proof, but this slight variance is not made a subject of discussion in the briefs, and under the circumstances the case should be determined upon the evidence as submitted to the jury. The instructions of the court to the jury are severely criticised. It may be said that these instructions do not as clearly present the case to the jury under the evidence as might be desired; but, so far as we have observed, any defect in the instructions in that regard would not result in prejudice to the defendant, but rather to the plaintiff herself. The instructions given by the court are quite lengthy and somewhat involved, and the proper limits of this opinion will not admit of a detailed discussion of them. It does not appear from the record that the defendants offered proper instructions setting forth their theory of the case.

We have found no error in the record that requires reversal, and the judgment of the district court is

AFFIRMED.

LEITON, J., not sitting.

STATE, EX REL. T. N. HINSON, APPELLEE, v. JOHN T. NICKERSON, APPELLANT.

FILED MARCH 4, 1916. No. 18552.

1. **Municipal Corporations: TAXATION.** A city can tax for city purposes only property "within the city." Property is taxed when the tax is levied, and not when it is valued by the assessor.

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2. ———: ———. Taxes cannot be levied upon property for city purposes after it has been detached from the city by the judgment of a court of competent jurisdiction.

APPEAL from the district court for Furnas county:
ERNEST B. PERRY, JUDGE. *Reversed and dismissed.*

Lambe & Butler and J. F. Fults, for appellant.

J. B. Smith and John Stevens, contra.

SEDGWICK, J.

This is an action in mandamus brought by relator as a citizen and taxpayer of Beaver City, in the district court for Furnas county, against respondent, county clerk of that county, to compel respondent to enter on the tax list the property of B. F. Seibert and others, so that said property may be held subject to the tax levied for city purposes by the city of Beaver City for the year 1913. A peremptory writ was issued, and respondent has appealed.

On and prior to April 1, 1913, the property herein sought to be subjected to the city tax was within the corporate limits of the city, and was duly listed and assessed for taxes for that year by the assessor of Beaver City. July 1 following Seibert and the other property owners procured a judgment and decree of the district court detaching their real estate from the city. This decree was not appealed from and is in full force and effect. Taxes were assessed and levied for city purposes for the year 1913, but the county clerk refused to extend the levy and assessment against the property covered by this decree.

Property "within the city" can be taxed for city purposes. This property was "within the city" until July 1. After that time it was not within the city. The question is, then: When was it "taxed?" Is the property taxed when the assessor lists it and it is valued for taxation, or is it taxed when the levy is made? The levy was made by the county board about 10 days after the property was put out of the city.

An exactly similar case has been decided by the supreme court of Utah, *Gillmor v. Dale*, 27 Utah, 372. The syllabus

shows how exactly like our statute theirs is. It is as follows: "Revised Statutes 1898, sec. 2516, provides that the assessor must before the first Monday in May assess all property subject to taxation; and sections 2595, 2596, and 2597 declare that every tax has the effect of a judgment, and every lien the force and effect of an execution, and that every tax upon real property is a lien against the property assessed. Section 206, subd. 3, authorizes city councils to levy and collect taxes on real and personal property as provided by law, and Const., art. XIII, sec. 10, provides that all corporations or persons shall be subject to taxation within the territorial limits of the authority levying the tax. By Revised Statutes 1898, secs. 253 and 2689, city councils are required, on or before the first Monday in July, to fix the rate of taxes, and levy the same on property within the city; and by section 2694 the tax so levied becomes a lien on the property assessed from the same time, and subject to the same conditions, prescribed in sections 2595, 2596 and 2597. Certain real estate within the limits of the city had been assessed, but, before the rate of taxes had been fixed by the council or any levy had been made, a judgment was rendered disconnecting the property from the city, and providing that it should no longer be subject to any liabilities, obligations, or taxes, or to the further imposition of taxes. *Held*, that the tax did not become a lien upon the property so severed." In the opinion the court said: "The city council was not authorized, either under the Constitution or by the provisions of the Revised Statutes, to levy a tax, except on property within its corporate limits, and any levy upon property not within such limits is without authority and void."

In *Wood v. McCook Water-Works Co.*, 97 Neb. 215, the company was held liable for the tax, whether it transferred its property after assessment to one who could be taxed or to one who could not be taxed. There was no difference in that respect, and it was held that transferring the property to the city itself, which could not be taxed, did

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not relieve the company from payment of the tax for that year. It was held to be a question of ownership, and not a question of power to tax. When it is a question of ownership, it is the ownership on April 1 that controls. When it is a question of power to tax, that power must exist when it is assumed to exert the power; that is, when the property is taxed. The property is taxed by the city when the city levies the tax.

The judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

ROSE, J., dissents.

STATE, EX REL. GEORGE A. MAGNEY, COUNTY ATTORNEY,
APPELLANT, v. RICHARD C. HUNTER ET AL., APPELLEES.

FILED MARCH 4, 1916. No. 19520.

Constitutional Law: COURTS: MUNICIPAL COURT. Chapter 182, Laws 1915, establishing a municipal court for cities of the metropolitan class, is not unconstitutional.

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. *Affirmed.*

H. H. Bowes and John G. Kuhn, for appellant.

John P. Breen, contra.

SEDGWICK, J.

In 1915 the legislature enacted a statute to create a municipal court in cities of certain classes. Laws 1915, ch. 182. It applied to each city of the metropolitan class, and was approved April 9, 1915, and could not "take effect until three calendar months after the adjournment of the session at which it was passed." Const., art. III, sec. 24. In October, 1915, the governor appointed the re-

spondents as judges of the municipal court of Omaha, a city of the metropolitan class, and on the 3d day of November, 1915, the relator filed his petition in *quo warranto* in the district court for Douglas county to try the right of respondents to exercise the duties of that office. The district court found the issues in favor of the respondents and dismissed the petition and the relator has appealed.

The contention is that the act is unconstitutional, and that there was no vacancy within the meaning of the act, and therefore the governor could not appoint. Many reasons are urged for considering the act unconstitutional. It is said it violates ten separate sections of the Constitution. It will, of course, be impossible to discuss in this opinion all of these objections at large. It does not violate section 11, art. III of the Constitution, by amending another existing law without repealing the same. It is contended that the act is not complete in itself because it provides that in certain respects the procedure in this court shall be the same as in the district court, and in other respects as in the county court, and does not itself provide in detail for these matters. The maxim "*Certum est quod certum reddi potest*," applies. The procedure is made certain in this act by providing what manner of procedure shall govern.

The act properly provides for the payment of the salaries of the judges and clerk of the court, and in that respect does not amend or interfere with the salaries of any other officers. The proviso that the answer or demurrer shall be filed on or before the first Monday after the return day and the reply or demurrer of the plaintiff on or before the second Monday after return day in cases where the practice of the district court is provided for does not render the act unconstitutional.

The provision that unclaimed witnesses' fees shall be forfeited to the city does not require that fines and forfeitures shall be paid to the city instead of the school fund, and does not amend the existing statute upon that subject.

The act does not violate section 19, art. VI of the Constitution, which provides that "all laws relating to courts shall be general, and of uniform operation," because it applies only to certain counties, and not to all counties of the state. The Constitution does not prohibit the establishment of courts of local jurisdiction, and it especially provides that the legislature may establish courts inferior to district courts "for cities and incorporated towns." The jurisdiction of such courts is, of course, limited to the cities and towns for which they are established. The act makes this court a court of record, and does not give the judges thereof jurisdiction at chambers, but this is not a violation of section 23, art. VI of the Constitution, which only authorizes, but does not require, the legislature to give the judges of such courts jurisdiction at chambers.

The statute does not violate the Constitution because it fails to make direct provision for trial by jury. This is covered by the general provision governing procedure.

The provision giving this court concurrent jurisdiction with the district court in certain cases does not give the right of appeal to this court from justice of peace courts. County courts generally have concurrent jurisdiction with district courts in certain cases, and no appellate jurisdiction has been claimed for county courts.

Transcripts of judgments of county courts are filed in the district court of any county in the state. The provision that transcripts form the judgments of this court may be also so filed is not invalid.

The provision that judges of this court shall have and exercise the ordinary powers and jurisdiction of a justice of the peace does not invalidate the act as conferring power upon the judges instead of upon the court. This provision in the same words as to county courts has never been so construed nor questioned.

The fact that the act applies to only one city, as the cities of the state are now populated, does not make it class legislation. It will apply to other cities also when they have attained the necessary number of people. The

Honorable W. A. Redick, before whom this case was heard in the district court, remarked in a scholarly opinion which we find in the record: "It is somewhat difficult to fathom the reasons of the legislature for establishing a municipal court for the city of Omaha and one for the city of South Omaha, and failing to provide for such a court in the city of Lincoln, and I shall not attempt a solution of this problem, as I do not deem it necessary. Assuming that the legislature has the power to create municipal courts for cities of the different classes, I think it must be conceded that incident to such power the legislature may select, in its discretion, those classes which are to be included in the provisions of the act, and, unless it can be affirmatively asserted that the action of the legislature is absolutely without logical support, the courts may not interfere with such discretion." This seems to answer the objection which is indicated therein.

The number of inhabitants of a city is not so unreasonable a basis for classification as to require the courts to interfere with the discretion of the legislature. The decision of the supreme court of Minnesota in *State v. Ritt*, 76 Minn. 531, is relied upon as holding otherwise. That case, in an opinion by Mitchell, J., held that a statute of that state which provided that a county assessor should be elected in each county having a population of not less than 100,000 and not over 185,000 inhabitants "is invalid, as being special legislation regulating the affairs of counties, in violation of section 33, art. IV of the Constitution; the attempted classification by population, as applied to the subject of the act, being incomplete, arbitrary, and evasive of the provisions of the Constitution." The court states what it considers the only theory upon which such a basis of classification would be proper, and says: "There is no apparent reason suggested by necessity, or by the difference in the situation or circumstances of counties having a population of not less than 100,000 and not over 185,000 and counties having a population of over 185,000, why the county assessor system should be applied

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to the former, and the latter left under the local assessor system in the same class with counties having a population of less than 100,000. The attempted classification is therefore arbitrary and incomplete, for the reason that it does not include all the members of the same class, but excludes some whose conditions and wants render such legislation equally necessary and appropriate to them as a part of the same class." We would not be so confident that, because "no apparent reason" was suggested to the minds of the judges, there could not possibly be a sufficient reason in the minds of the legislators. They are in better position to know the "conditions and wants" of different classes of population than are the courts. If the legislature has made a mistake as to the condition and wants of the counties of the largest population, would that compel the court to hold that suitable provision for the condition and wants of counties not quite so populous must be overthrown? This court considers that we cannot be too careful to avoid interference with the legislature's determination of questions of public policy. We do not assume to determine such questions. Even if compelled to hold the application of this statute to cities of less than 40,000 population invalid, we would hesitate to declare it unconstitutional in its application to cities of the metropolitan class.

The question whether the governor was authorized to appoint the members of this court when the statute took effect appears to be presented by the record, but is not insisted upon by the parties, and without further investigation we have concluded to affirm the judgment of the district court.

AFFIRMED.

MINNIE BERGMANN ET AL., APPELLEES, V. EMIL KOEHN
ET AL., APPELLANTS.

FILED MARCH 4, 1916. No. 18568.

1. **Intoxicating Liquors: CIVIL ACTION: LIABILITY.** A licensed saloon-keeper who sells intoxicating liquor to another, which causes or contributes to his death, is liable to the wife and minor children of the deceased, constituting one family, for all of the damages to their means of support which they have sustained by reason of such sales.
2. ———: ———: **VERDICT: JUDGMENT.** In an action against the saloon-keeper and his surety for damages, in which the jury has returned a verdict against both defendants for \$9,000, the trial court has the power to render a judgment against the principal defendant for the full amount of the verdict, and may also render judgment against the surety for the sum of \$5,000, which is the amount for which the surety company is liable on its bond.

APPEAL from the district court for Madison county:
ANSON A. WELCH, JUDGE. *Affirmed.*

Willis E. Reed, Jack Koenigstein and Charles G. McDonald, for appellants.

Charles H. Kelsey, contra.

HAMER, J.

The plaintiff brought suit in the district court for Madison county for herself and minor children against Martin A. Sporn, a licensed saloon-keeper doing business in the city of Norfolk. She joined as a defendant the Title Guaranty & Surety Company, of Illinois, which had furnished Sporn his bond under the provisions of chapter 40, Rev. St. 1913. She also joined Emil Koehn and his surety, together with Seiler & Benning and their surety. She prayed for a judgment for \$17,000 damages, which she alleged had been sustained on account of the death of her husband, William Bergmann, whose death was caused by the sale of intoxicating liquors furnished

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him by the defendant saloon-keepers. On the trial the action was dismissed as to defendants Koehn and Seiler & Benning and their bondsmen. The jury returned a verdict against Sporn and the Title Guaranty & Surety Company for the sum of \$9,000, and each defendant has appealed.

It is contended that the evidence is insufficient to sustain the verdict. The record shows conclusively that plaintiff's husband was a frequenter of defendant Sporn's saloon, and from time to time had bought intoxicating liquors from him; that on the 14th day of June, 1913, he visited the defendant's saloon, in the city of Norfolk, and there purchased and drank intoxicating liquors until he became drunk. At about 7 o'clock on the evening of that day Bergmann started to go to his home, some three or four miles south of the city. He was driving his team of horses and a light buggy south on Thirteenth street and the highway which connected with that street, which highway crossed the main track of the Chicago & Northwestern railroad at right angles. While he was so driving on his way home he collided with the regular passenger train at the railroad crossing and was instantly killed. The evidence shows that he was intoxicated to such an extent that he failed to notice the approach of the train. The record shows that Bergmann was at that time 33 years of age; that he was a successful farmer; that he was an industrious man; kind to his family; and that he contributed to their support a sum in excess of \$500 each year, with an increasing amount from year to year. The plaintiff was his wife. They had two minor daughters, one aged about two years and the other an infant. It follows, therefore, that the verdict was sustained by the evidence, and was not excessive as to the principal defendant. This court has often held that in such cases the person who sold and furnished the intoxicating liquors to the deceased is liable for all the damages occasioned by such sales. *Horst v. Lewis*, 71 Neb. 365; *Schick v. Sanders*, 53 Neb. 664; *Roose v. Perkins*, 9 Neb. 304; *Wardell v. McConnell*, 23 Neb. 152.

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It appears that the court rendered a judgment against Sporn for the full amount of the verdict, but as to the surety company judgment was rendered against it for the sum of \$5,000 only, which was the amount of the bond. It is contended that the court had no power to render such a judgment. In answering this contention, it is sufficient to say that the surety company cannot complain of the action of the trial court. That company, by its bond, undertook to become surety for the saloon-keeper to the amount of \$5,000, and the judgment rendered did not exceed the amount of its liability.

Finding no error in the record, the judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

STATE, EX REL. AUGUST C. HARTE, RELATOR, V. HARLEY G. MOORHEAD, RESPONDENT.

FILED MARCH 7, 1916. No. 19510.

1. **Mandamus: PARTIES: ACT CREATING COMMISSIONER DISTRICTS: CONSTITUTIONALITY.** An elector of a county has such interest in the government of the county as to enable him to challenge the constitutionality of a statute which attempts to divide the county into commissioner districts and fix the basis of representation in the county board, on the ground that such statute deprives the voters of the county of equality before the law.
2. **Constitutional Law: STATUTE: VALIDITY.** "An act which violates the true meaning and intent of the Constitution and is an evasion of its general express or plainly implied purpose is as clearly void as if in express terms prohibited." *State v. Bartley*, 41 Neb. 277.
3. —: **RESERVATION OF POWERS.** Our Constitution (Art. I, sec. 26) declares that "all powers not herein delegated remain with the people." This is characteristic of a republican form of government and distinguishes such government from a monarchy or oligarchy.

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4. ———: **EQUALITY: RIGHTS OF VOTERS.** Under our Constitution all government derives its "just powers from the consent of the governed" (Art. I, sec. 1), and the principle of "equality before the law" requires that every voter shall, as far as practicable, have an equal voice in the affairs of government.
5. **Counties: POWERS: RIGHTS OF VOTERS.** The power of local legislation and other governmental powers are delegated to the counties, and in the exercise of those powers all voters of the county must, as far as practicable, be given an equal voice.
6. **Elections: DISTRICTS: APPORTIONMENT.** It is not required that equality of representation shall be mathematically exact. But the apportionment of representatives of the people in any government body must be according to the population represented as near as may be.
7. **Constitutional Law: ELECTION DISTRICTS.** The legislature has no power to disregard the constitutional standard of apportionment because of the nature and character of the population and business interests. The constitution will not permit one class of voters to be given more power in governmental affairs than is given to another class.
8. ———: **LEGISLATIVE MOTIVES: PROOF.** The courts will not inquire into nor consider the motives that may have actuated the legislature, except as those motives appear in their public acts or journals. The validity of an act does not depend upon the motive for its passage; but, whenever and to the extent that the legislature transcends its powers, it is conclusively presumed that it intended to so transcend them, and parol evidence of good motives or other considerations are not allowed to obviate the effect of such unlawful intent.
9. ———: **LEGISLATIVE ACTS: COMPLIANCE WITH CONSTITUTION: QUESTION FOR COURTS.** There is no doubt that the legislature may exercise a reasonable discretion in selecting the method of securing practical equality. But the question whether constitutional requirements have been applied at all is a question for the courts.
10. ———: **ELECTION DISTRICTS: APPORTIONMENT.** Chapter 19, Laws 1915, which provides that counties of more than 125,000 inhabitants shall be divided into five districts, and that all territory outside of a metropolitan city and more than two miles from the limits of such city shall comprise one of those districts and have equal representation upon the county board with each of the other four districts, is unconstitutional, because the result is that in Douglas county, to which the act applies, the district so formed will contain less than one-third of the population of each of the

other districts and would have equal power in the government of the county.

Original proceeding in mandamus to compel respondent, as election commissioner, to place the name of relator on the primary ballot as candidate for county commissioner. *Writ allowed.*

Myron L. Learned, for relator.

George A. Magney and Ray J. Abbott, contra.

SEDGWICK, J.

By chapter 150, Laws 1913 (Rev. St. 1913, sec. 979), it was provided: "Counties having more than one hundred and twenty-five thousand inhabitants, shall be divided into five districts numbered respectively one, two, three, four and five, and shall consist of two or more voting precincts, comprising compact and contiguous territory and embracing, as near as may be possible, an equal division of the population of the county, and not subject to alteration oftener than once in four years."

In 1915 (Laws 1915, ch. 19) the legislature enacted a statute entitled "An act to amend section 979, Revised Statutes of Nebraska for 1913, relating to commissioner districts, and to repeal said original section." The act provides: "Counties having more than one hundred and twenty-five thousand inhabitants, shall be divided into five districts numbered respectively one, two, three, four and five, and shall within the incorporated limits of any city of the metropolitan class or city of the first class in such county and within the territory comprised within two miles of such incorporated limits consist of two or more voting precincts comprising compact and contiguous territory and embracing, as near as may be possible, an equal division of the population of such cities and adjacent territory as hereinbefore provided and not subject to alteration oftener than once in four years: Provided, that all of the territory in such county outside the limits of such

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city of the metropolitan class and city of the first class and such adjacent territory as hereinbefore provided, shall comprise one commission district and the person representing such district shall be a resident therein and one commissioner shall be nominated by each of said districts, but shall be elected by the qualified electors of the entire county, as heretofore provided. The district lines shall be made to conform to the division herein made so that the commissioner to be elected at the next general election in 1916 shall be elected from the district outside of such metropolitan city and city of the first class and adjacent territory as hereinbefore provided for and after such division the district lines shall not be changed at any session of the board unless all of the commissioners are present at such session: Provided, in counties of one hundred and twenty-five thousand inhabitants or more, and in counties where a majority have voted for five commissioners it shall be the duty of the county board of such county, at their first meeting after the publication of the state or federal census, or after an election deciding to have five, to divide said county into five commissioner districts, as provided for."

Douglas county is the only county in the state having the specified number of inhabitants, and therefore is alone interested in this controversy. Under the former statute the county had been divided into commissioner districts, and relator resided within the two-mile limit of the city of Omaha and in the third commissioner district, which embraced also a part of the territory without the two-mile limit. The relator applied to this court for a writ of mandamus to require the respondent, who is election commissioner of Douglas county, to "receive and file the nomination papers of your relator, and place his name upon the official primary ballot for the primary election to be held April 18, 1916, as a candidate for the nomination of county commissioner in the third commissioner district in Douglas county, Nebraska, as defined July 9, 1906." The respondent appeared and answered the appli-

cation for the writ. In his brief it is conceded that "there is but one question at issue in this case: Is chapter 19, Laws of 1915, unconstitutional?" Later in the brief it is suggested that "the only persons who could complain would be those who are in some way injured by such a division of the county. The relator is not injured and has no right to complain." But this point is not seriously contested. The supreme court of Michigan remarked in a similar case: "This court, as appears from the authorities above cited, has taken care to prevent officious intermeddling by the use of this discretionary writ, and at the same time has swept away technicalities where public interests are involved and prompt action is necessary. We have quite uniformly overruled this objection in cases of the latter class." *Giddings v. Blacker*, 93 Mich. 1.

Is the act of 1915 unconstitutional? The result of that act as applied to Douglas county is that there are four districts comprising Omaha and the territory two miles in width around the city, which contains over 18,000 voters, and the remaining district is a narrow strip around the outside of the two-mile limit, and contains only about 1,700 voters. This district is in two parts not contiguous. The relator contends that the statute is unconstitutional because it violates section 4, art. IV of the federal Constitution, which guarantees to every state a republican form of government, and that it violates the first section of the fourteenth amendment, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," and that it violates both express and implied provisions of the Constitution of Nebraska. It is contended that a statute which so divides a county into districts that an elector in one district has as much voice in the control of the affairs of the county as do three or four electors in another district is unconstitutional. "The fact that a statute is within the letter of the Constitution is not sufficient. * * * An act which violates the true meaning and intent of the Constitution and is an evasion of its

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general express or plainly implied purpose is as clearly void as if in express terms prohibited." *State v. Bartley*, 41 Neb. 277. That this statement of the law is substantially correct has never been controverted in this state. In *State v. Seavey*, 22 Neb. 454, it was decided that the provision of an act of the legislature "making it the duty of the governor to appoint a board of fire and police commissioners for cities of the metropolitan class is not repugnant to the Constitution." In *State v. Moores*, 55 Neb. 480, a contrary view appears to have been taken, which was affirmed in *State v. Kennedy*, 60 Neb. 300. The discussion is at great length, occupying some 60 pages of the report. The opinion by Judge Norval, and concurred in by Judge Harrison, cites many authorities. The dissenting opinion prepared by Mr. Commissioner Ryan, and concurred in by Judge Sullivan and Commissioner Irvine, presents also a quite exhaustive discussion of the question with citation of many authorities. Afterwards, in *Redell v. Moores*, 63 Neb. 219, the personnel of the court having changed in the meantime, *State v. Moores, supra*, is expressly overruled, and the doctrine announced was: "The legislature may by statute confer upon the governor the power to appoint members of the board of fire and police commissioners of cities of the metropolitan class." These decisions are referred to in *State v. Savage*, 64 Neb. 684.

In *Newport v. Horton*, 22 R. I. 196, 50 L. R. A. 330, it is said that all of the authorities except *State v. Moores, supra*, seem to be that a statute authorizing the governor to appoint a board of police commissioners for a city is not unconstitutional as interfering with the right of local self-government; "with the exception stated, not one has denied the general power of the legislature to assume the control of the local police." In an extensive note (50 L. R. A. 330) it is contended that the court was in error in its construction of the laws of Rhode Island. The opinion of the court, however, is instructive. It distinguishes between police officers and governmental officers of cities and other divisions of the state. The court said:

"Obviously this must depend upon the status of a police officer. In *Kelley v. Cook*, 21 R. I. 29, this court has recently decided that he is an officer appointed to perform a public service, and in appointing him the mayor and aldermen of a city merely exercised one of the functions of government in which the city had no special interest and from which it derived no special benefit or advantage in its corporate capacity. A city, therefore, in preserving the public peace or enforcing the laws within its borders, is not acting for itself or for its own inhabitants merely, but for the whole people; in other words, the state. * * * *People v. Common Council of Detroit*, 28 Mich. 228, involved the creation of a park commission, and again distinguishing the case from *People v. Mahaney*, 13 Mich. 481, the court held that the people of other parts of the state had no right to dictate to the city of Detroit what fountains it should build or what land it should buy for a park or boulevard, at its expense, for the recreation of its citizens. *People v. Mayor of Detroit*, 29 Mich. 343, was on the same subject. *Robertson v. Baxter*, 57 Mich. 127, related to the authority of a drain commissioner to act outside of his township. *Wilcox v. Paddock*, 65 Mich. 23, held that the legislature had no power to authorize a judge of probate of one county to assess benefits upon lands outside of his county for a local improvement. *Board of Metropolitan Police v. Board of Auditors*, 68 Mich. 576, held that the police commission of Detroit, paid for by the city, could not be assigned to duty in other townships. The Michigan cases therefore draw a clear line between local and state service."

The court makes this distinction plain by quoting the following from *Burch v. Hardwicke*, 30 Grat. (Va.) 24, 38 (32 Am. Rep. 640): "The distinction recognized in all of them is between officers whose duties are exclusively of a local nature and officers appointed for a particular locality, but yet whose duties are of a public or general nature. When they are of the latter character they are state officers, whether the legislature itself makes the ap-

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pointment or delegates its authority to the municipality. The state, as a political society, is interested in the suppression of crime and in the preservation of peace and good order, and in protecting the rights of persons and property. No duty is more general and all-pervading than this. It extends alike to towns and cities as to the country."

In the case at bar we are dealing, not with police officers of cities, but with counties and their government. County governments are local in their nature, and the Constitution protects them in their right of local self-government. "The legislature shall provide by law for the election of such county and township officers as may be necessary." Const., art. X, sec. 4.

The Constitution makers had something definite in mind when they provided that county officers should be elected. If a statute should provide that the voters of one township should elect the county officers, that would not be the election that the Constitution intends. If one block of the city with perhaps 20 or 30 votes was constituted a voting precinct and empowered to elect one of five members of the county board, and the remainder of the county divided equally into the four districts with power to elect the four remaining members, this, of course, would not be the election intended. Counties are by the Constitution and statutes given control of their own local matters. No one outside of the county is vitally interested in these matters, and every one in the county is interested equally with all others. To give them unequal power in the local government of the county violates the constitutional right of representation as plainly and in the same degree as unequal representation in the state legislature or in congress would violate the constitutional right of representation in public affairs. The first section of article I of our Constitution declares that "all persons are by nature free and independent," and have certain inherent and inalienable rights and that governments derive "their just powers from the consent of the governed." The last section of

the same article declares that "all powers not herein delegated remain with the people." These provisions are characteristic of a republican form of government. If all power rests in the first instance with the people, and they delegate certain powers to certain of their representatives and retain all other powers, this distinguishes such a government from a monarchy or oligarchy. When the present Constitution was adopted county government had been established and the counties had been given a right to legislate upon certain local matters. This condition was assumed in our present Constitution, and, pursuant thereto, has been continued in elaborate legislative provisions. The principal of our Constitution of absolute equality in governmental matters is recognized in the legislation which requires that the great seal of the state shall contain the words "Equality before the law." It must follow that the legislature has no absolute and unlimited power to so distribute the control of county affairs that the voters in one of five districts of the county can control the affairs of the county. There appears to be no necessity in this case for unequal representation. There can be such number of districts in the county and those districts can be so appointed as to meet every legislative purpose, and at the same time give practically equal representation to all of the people. It is conceded that, if this smaller district had been divided into two districts, giving each of these two districts the power to select a member of the county board, and the remainder of the county divided into three districts with power to select only three members of the county board, the statute would be unconstitutional.

The courts have hesitated to attempt an exact definition of a republican form of government, but what constitutes equality before the law has been frequently considered. The supreme court of Kentucky said: "He has studied our Constitution in vain who has not discovered that the keystone of that great instrument is equality—equality of men, equality of representation, equality of burden, and

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equality of benefits. Section 1 of the Bill of Rights provides: 'All men are by nature free and equal.' * * * Section 3: 'All men, when they form a social compact are equal.' * * * Section 33 provides for equality of representation. Sections 171, 172, 173 and 174 provide for equality of taxation (uniformity). Section 39 provides for equality (general) of laws. Indeed, it could not be otherwise, for, when our forefathers emigrated from their European home, it was in the main to escape from the oppression of inequality. They brought with them a burning love for this great democratic principle, and imbedded it deep in the foundation of the empire they were destined to erect, and which they will preserve so long as the love of liberty is more than a name. When they threw off the supervising government of the mother country, it was because they were denied equality of representation; or, as they then expressed the evil, they had imposed upon them taxation without representation. Equality of representation is a vital principle of democracy. In proportion as this is denied or withheld, the government becomes oligarchical or monarchical. Without equality republican institutions are impossible. Inequality of representation is a tyranny to which no people worthy of freedom will tamely submit. To say that a man in Spencer county shall have seven times as much influence in the government of the state as a man in Ohio, Butler, or Edmonson, is to say that six men out of every seven in those counties are not represented in the government at all." *Ragland v. Anderson*, 125 Ky. 141, 160 (128 Am. St. Rep. 242).

In the same opinion the court said: "It is not insisted that the equality of representation is to be made mathematically exact. This is manifestly impossible. All that the Constitution requires is that equality in the representation of the state which an ordinary knowledge of its population and a sense of common justice would suggest. We have not been referred to a more accurate or better description of the equality required by the Constitution

than that contained in the report of Daniel Webster, as chairman of a senatorial committee engaged in a duty similar to that involved in the act under discussion: "The Constitution, therefore, must be understood, not as enjoining an absolute relative equality, because that would be demanding an impossibility, but as requiring congress to make an apportionment of representatives among the several states, according to their respective numbers, as nearly as may be. That which cannot be done perfectly must be done in a manner as near perfection as can be. If exactness cannot, from the nature of things, be attained, then the nearest practicable approach to exactness ought to be made."

The supreme court of Michigan used similar language: "It was never contemplated that one elector should possess two or three times more influence, in the person of a representative or senator, than another elector in another district. Each, in so far as it is practicable, is, under the Constitution, possessed of equal power and influence. Equality in such matters lies at the basis of our free government." *Giddings v. Blacker*, 93 Mich. 1.

It was suggested, on the one part, that the object of this legislation was to give the farmers in the outlying districts adequate representation on the board, and, on the other part, it was suggested that the motive was to remove this relator from the board where he had been a member, and to prevent the selection of a farmer residing within two miles of the city limits. This court will not inquire into nor consider the motives that may have actuated the legislature. |||

"There is no difficulty in making an apportionment which shall satisfy the demand of the Constitution. It is not the purpose or province of this court to inquire into the motives of the legislature. Courts will not discuss the motives of legislative bodies, except as they appear in the public acts or journals of such bodies. The validity of an act does not depend upon the motive for its passage. The duty of a court begins with the inquiry into the constitu-

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tionality of the law, and ends with the determination of that question." *Giddings v. Blacker, supra*.

"In so far as a legislature keeps within the limits of powers in enacting laws its motives cannot be inquired into, and its discretion is not a subject for review in the courts; but whenever and to the extent that it transcends its powers, it is conclusively presumed that it intended to so transcend them, and parol evidence of good motives or other considerations are not allowed to obviate the effect of such unlawful intent. * * * Nor is evidence admissible, in support of such apportionment, to show that one district, with a less population than another, was given the same representation because of the excessive assessed valuation of property therein, and the nature and character of its population and business interests. The legislature has no power to disregard the standard of apportionment as fixed by the Constitution." *State v. Cunningham*, 35 Am. St. Rep. 27 (83 Wis. 90).

All voters are equal before the law. The Constitution will not permit one class of voters to be given more power to determine the government than is given another class. If the purpose is to give adequate representation upon the board to the farming interests, no reason is perceived why it could not be done in this case without violating a fundamental principle of our form of government by giving one class of voters more power in the government than is given to another class. Since perfect equality is impracticable, there is no doubt that the legislature may exercise a reasonable discretion in selecting the method of securing practical equality.

The supreme court of Illinois discussed at large the limits of legislative discretion in such cases in *People v. Thompson*, 155 Ill. 451, 481, and it was there held that, while the question whether the constitutional requirements have been applied at all is a question for the courts, the question "whether or not the nearest practicable approximation to perfect compactness and equality has been attained is a question for the legislative discretion."

It was also said: "Only a reasonable approximation toward equality is essential, under the requirements of the Constitution that senatorial districts shall contain, as nearly as practicable, an equal number of inhabitants." The court said: "The apportionment as made by the act of 1893 does not make the districts vary as much in population as from a fifth below to a fifth above the ratio. Here is a wide latitude, in a populous state, for inequality, it must be admitted; and we do not mean to say that the legislature could have arbitrarily formed a district containing simply the constitutional minimum of four-fifths, and another district adjoining with one-fifth or more above the ratio, when, by taking a county from the larger and adding it to the smaller district, greater equality in population and compactness of territory could have been secured, for in such case it might perhaps be said that the principles of compactness of territory and approximate equality in population, above the minimum, had been disregarded and not applied at all by the legislature."

From this it appears that that court was not considering a case in which one district had less than one-third of the population of any other district, and clearly that court would have considered that in such an apportionment "equality in population, above the minimum, had been disregarded and not applied at all by the legislature." It is clear that in the statute we are considering the legislature has arbitrarily divided this county into districts without any regard whatever to equality in population of the district, and it must be considered that the controlling principle of equality before the law has not been applied at all. In this view of the case, the statute is unconstitutional and should be disregarded. The writ is

ALLOWED.

MORRISSEY, C. J., dissenting.

I dissent from the majority opinion because no provision of our Constitution has been pointed out to which the act does violence, and it is the duty of the court to sustain

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every law which does not clearly violate the provisions of the Constitution. There is no provision in our Constitution directing that counties shall be divided into commissioner districts, or determining that such an office as county commissioner shall be created. The whole field as to what county officers shall be elected, and how they shall be elected, and from what territorial divisions, is left entirely to the legislature. We have long recognized the wisdom of dividing counties into districts, and in overthrowing this act the majority opinion repudiates the very policy it purports to support. While the act requires the commissioners to be chosen from districts, they are elected by the entire electorate of the county.

A few general principles of constitutional law should be kept in mind in considering this question.

A fundamental principle announced in *Hallenbeck v. Hahn*, 2 Neb. 377, is: "The Constitution of this state confers plenary legislative power upon the general assembly; and, if an act is within the legitimate exercise of that power, it is valid, unless some express restriction or limitation can be found in the Constitution itself."

In the same case it was said (p. 397): "This doctrine is elementary, is cardinal, and arises out of the very nature of our form of government. With us, sovereignty resides with the people. Were they acting as a whole for themselves, there can be no doubt but this, or any other law that should receive a majority sanction, would be conclusive. But, parceling out the exercise of their sovereign power to the three departments of government—the legislative, the executive, and the judicial—to the first has been committed, except what has been abandoned to the congress of the United States, the exercise of the whole sovereign law-making power as completely and absolutely as possessed by the people, subject only to such limitations as the people may have chosen to impose. These limitations are set out in the state Constitution."

The constitutional provision quoted in the majority opinion that "all powers not herein delegated are reserved

to the people," instead of being, as indicated by the opinion, a limitation upon the legislature, is a positive affirmation that, unless restrained by constitutional limitations, the people, acting through their legislature, are free to enact any law they deem desirable.

Where no limitation is expressed in the Constitution, "The framers of the Constitution relied for protection in this regard upon the wisdom and justice of the representative body and the accountability of its members to the people, rather than the restraining power of the courts of law. It is said that 'the courts can enforce only those limitations which the Constitution imposes, and not those implied restrictions, which, resting on theory only, the people have been satisfied to leave to the judgment, patriotism, and sense of justice of their representatives.' Cooley, *Constitutional Limitations*, 129. *State v. McCann*, 21 Ohio St. 198, 210." *State v. Board of County Commissioners*, 4 Neb. 537.

It is also well settled that "A legislative act should not be declared unconstitutional, unless it is so clearly in conflict with some provision of the fundamental law that it cannot stand." *State v. Nolan*, 71 Neb. 136.

Has the act under consideration been shown to be "so clearly in conflict with some provision of the fundamental law that it cannot stand?" Relator contends that the act violates section 4, art. IV of the United States Constitution, which provides that congress shall guarantee to every state a republican form of government. The opinion discusses at some length the nature of a republican form of government. This is a political question, and is beyond the jurisdiction of the judiciary. *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U. S. 118. "There does not seem to be any case which is authority for the proposition that an act of the legislature of the state, with a republican form of government and so recognized by congress, can be held invalid under the provisions of article IV, sec. 4 of the Constitution." *Susman v. Board of Public Education*, 228 Fed. 217.

In discussing the nature of a county, in *Board of Commissioners v. Mighels*, 7 Ohio St. 109, 119, it was said: "A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy."

In its control over the governmental agencies of the state, known as counties, wherein is the legislature limited by the Constitution? The Constitution provides: "The legislature shall provide by law for the election of such county and township officers as may be necessary." Const., art. X, sec. 4. Under this provision the legislature could not provide for the appointment of county officers. While the Constitution directs that the legislature shall provide by law for the election of county officers, it has seen fit not to restrain the legislative discretion as to the number of county officers, their duties, their terms of office, nor their qualifications. Wherein does an act providing for the election of county commissioners from districts into which the county is divided violate any constitutional provision? If the legislature has the power to provide that county commissioners shall be chosen from districts, has not the Constitution left the legislature free to exercise its own discretion in the matter? While not denying the authority of the legislature to create commissioner districts, the majority opinion holds that the legislature, in doing so, must not do violence to the principle of "equality of representation," and cites *People v. Thompson*, 155 Ill. 451, *State v. Cunningham*, 83 Wis. 90,

Giddings v. Blacker, 93 Mich. 1, and *Ragland v. Anderson*, 125 Ky. 141. In these cases acts of the legislature dividing the state into legislative districts of unequal population were held unconstitutional, but an examination of these cases shows that in each state the Constitution provided that the districts should be divided "according to population," or should contain, "as nearly as practicable, an equal number of inhabitants." No such constitutional provision has been shown to limit the legislature in this case.

The majority opinion quotes the discussion of the Kentucky court in *Raglan v. Anderson*, *supra*, upon the principles of "equality." The Kentucky Constitution expressly provided that the state should be divided into senatorial and representative districts "as nearly equal in population as may be." Since that decision the Kentucky court has held that, where a city council has authority to divide the city into wards and provide for the election of councilmen, "there being no constitutional or statutory provision requiring that such division be so made as to provide equal representation, the courts cannot interfere with the exercise of the legislative power so conferred by invalidating an ordinance so dividing the city into wards as to cause unequal representation." *Moore v. City of Georgetown*, 127 Ky. 409. In an opinion containing a full discussion of the question, the court, among other things, said:

"It is true that fair representation and equal apportionment is a valuable privilege, and one that should be adhered to; but, when the legislative department of the state that created these municipalities and provided an elaborate plan for their government failed to adopt either directly or by implication any scheme to regulate or control them in the selection of their legislative boards, we do not feel that the courts are warranted in interfering with the discretion lodged in the people of these cities and their representatives whose duty it is to divide the city into wards. So far as our examination extends, in every in-

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stance in which the judiciary has undertaken to interfere with the legislative department of the state or its municipalities in the power of apportionment and representation authority direct or by implication has been found in the Constitution or the statutes. * * * Whilst the division of Georgetown into wards by the council and the allotment of representation is apparently unfair and unequal, we do not feel disposed to adjudge that it exceeded the power granted. Nor can we hold that it violates any fundamental principle of government."

In *Richardson v. McChesney*, 128 Ky. 363, the Kentucky court also held: "A legislative apportionment of the state into congressional districts cannot be judicially reviewed, in the absence of a constitutional provision controlling apportionment." In the opinion the court said: "Except when limited by the Constitution of the state, the general assembly, especially in administrative and political affairs, is beyond the reach of the judiciary of the state. We have no authority to pass judgment upon its acts. In no case that has come under our notice have the courts undertaken to attempt to restrain the legislative departments, unless it violated some provision of the organic law of the state. * * * But in the matter of congressional districts we find nothing in our state Constitution to guide us. There is nowhere any limitation upon the power of the legislature, and it would be assuming authority this court does not possess if we undertook to control a coordinate department of the government in the performance of a power vested exclusively in it. It is not for the judiciary to question the policy, expediency, or propriety of laws enacted by the general assembly, unless they conflict with the Constitution."

In Tennessee, where the Constitution provides for the election of justices of the peace in districts of the counties who shall constitute the county board, it was held that the court would not interfere with the action of the legislature in redistricting a county, "though the districts as laid off in the statute are disproportionate in area, wealth, and

population, and of shape inconvenient to their inhabitants." *Marey v. Powers*, 117 Tenn. 381. In the opinion the court said (p. 392): "The general rule is that where one of the departments of the state is vested with a power, to be exercised when and in such manner as those charged with its exercise may consider expedient and proper in its discretion, the action of the department cannot be interfered with by any other department. This is especially so in matters of a political character. * * * (p. 398) The general assembly had the exclusive and absolute power to lay off Knox county into civil districts. How it should execute this power was for it to determine. It must be assumed that it had the proper data and information before it to do so intelligently, and that the districts created by it are of convenient size for their primary purpose, the efficient administration of the law in the county, and also in the interest and for the good of the people affected. The courts have no jurisdiction to inquire into these matters, and the civil districts must stand as laid off by the act, until it is repealed or amended by the legislature."

The Constitution of Michigan provides: "A board of supervisors, consisting of one from each organized township, shall be established in each county. * * * Cities shall have such representation in the board of supervisors of the counties in which they are situated as the legislature may direct." The legislature provided that the president of the village of Mackinac should be a member of the board of supervisors. This was claimed to violate the quoted provisions of the Constitution. It was argued that this act allowed a village to have the same representation on the board as a city, and, further, that the act provided for more than one supervisor from each township. The court held the act valid, and said: "The necessity for the enactment of the statute becomes most apparent in the case of this village, when we take into consideration its geographical position with reference to other portions of

the county in which it is located. It is situated on two islands about five miles from the other portions of the territory of the county, and for several months in the year access with the mainland becomes exceedingly difficult. Its business interests, to a great extent, are such as have but little connection with those of the other portions of the county; and its property depends largely for its value on considerations which do not affect the remainder of the county. It seems to be entirely proper that its interests should be specially represented on the board which apportions the taxes to be paid, on its property holders, and whose action continually, more or less, involves its local interests." *Attorney General v. Preston*, 56 Mich. 177.

In *Redell v. Moores*, 63 Neb. 219, the doctrine on which the majority opinion is based, previously announced by this court in *State v. Moores*, 55 Neb. 480, that an act might be unconstitutional as being in violation of the spirit of the Constitution, was definitely set aside. Speaking of the decision in *State v. Moores*, *supra*, it was said by Judge Sullivan, in *State v. Kennedy*, 60 Neb. 300, that, if the view that the spirit of the Constitution may be invoked to declare a law invalid "is to be acquiesced in and accepted as a rule of construction, the Constitution of the state is to be fully known only by studying the theories of the judges who are chosen to expound it; it will expand or contract with every fluctuation of the popular will which produces a change in the personnel of the court; and the limitations upon legislative power will be as unknown and unknowable as were the rules of equity in the days when the chancellor's conscience was the law of the land."

The wisdom of the act is not for the court to determine, although it clearly appears that there is good reason for its enactment. The policy of dividing the county into districts is based on the supposition that members of the board ought to be familiar with the local needs of their constituents; that they ought to be in close touch with

those they are elected to serve and whose business they administer. This act is designed to provide representation for the rural district, where the avocations of the people are different from those within the metropolitan city. While there are fewer voters in the rural district, they are scattered over a much wider territory, and their interests are more diversified. There are many miles of road within this district, and there are many bridges. These roads and bridges come within the jurisdiction of the board. Members of the board living within the metropolitan city, enjoying the advantages of paved streets, strangers to the vicissitudes of country life, may not be so ready to respond to the needs of this particular class as one who maintains his home among them. Then again, *per capita*, this district may represent a much greater proportion of the taxable property of the county than a district of greater population within the metropolitan city, where large numbers of voters possess no property and contribute nothing to the support of the county.

The majority opinion is an unwarranted invasion of the power vested exclusively in the legislature, and cannot be reconciled with the provisions of our Constitution.

LETTON and ROSE, JJ., concur in this dissent.

JOSEPH M. KIMMEL v. STATE OF NEBRASKA.

FILED MARCH 18, 1916. No. 19375

1. **Forgery: COPIES OF ORDERS.** Making duplicates or copies of orders for the payment of money, imitating the signatures of the makers of the original orders, and thereafter selling them to a third person as, and for, the true, genuine and original orders, is, in law, a forgery.

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2. ———: EVIDENCE. Evidence of indorsing and selling such orders, thereby obtaining their face value, with intent to defraud, will sustain a conviction for the crime of uttering and publishing such forged instruments.
3. Criminal Law: NEW TRIAL: SHOWING: NEWLY DISCOVERED EVIDENCE. Affidavits attached to the motion for a new trial, asked for on the grounds of newly discovered evidence, examined, and found to be immaterial in that they fail to support the ground set forth in the motion.
4. Forgery: DEFENSE: INSTRUCTIONS. Instructions given by the trial court examined, and *held* to have properly submitted defendant's theory of his defense to the jury.
5. ———: INSTRUCTIONS: INTENT. The principal instruction of which defendant complains is set forth in the opinion, and *held* to be without error.

ERROR to the district court for Burt county: WILLIS G. SEARS, JUDGE. *Affirmed.*

J. M. Priest and B. C. Enyart, for plaintiff in error.

Willis E. Reed, Attorney General, and *Charles S. Roe*, *contra.*

BARNES, J.

The county attorney of Burt county filed an information in the district court charging Joseph M. Kimmel with the crime of forging three certain orders for sums of money, and with uttering and publishing the forged instruments with intent to defraud. A plea of not guilty was entered and a trial was had. Before the case was submitted to the jury, the court withdrew the charge contained in the first count of the information. The jury found the accused guilty on the second and third counts of the information. A motion for a new trial was overruled. The court suspended sentence and paroled the accused to one Joseph Force, a resident of Burt county. Later on the parole was revoked at the instance of the county attorney, and Kimmel was sentenced to the penitentiary for a term of not less than one year nor more

than eight years. From that judgment he has prosecuted error.

The first assignment of error is that the verdict is not according to the evidence. The second count in the information reads as follows: "The said Herbert Rhoades, county attorney of the county and state aforesaid, gives the court to understand and be informed that Joseph M. Kimmel, on or about the 25th day of September, A. D. 1914, in the county of Burt and state of Nebraska, aforesaid, then and there being, did then and there unlawfully, knowingly, wilfully, maliciously, feloniously, and falsely make, forge and counterfeit an order or request for the payment of money, to which he falsely, fraudulently, and with the intent to defraud, forged the name of Andrew S. Gilbert, which said order or request for the payment of money was in the following words and figures, to wit:

" 'July 23, 1914.

" 'To Farmers State Bank:

" 'Please pay to J. M. Kimmel, the bearer hereof, the sum of \$105.15 on my account, for which amount I hereby acknowledge my indebtedness to you and agree to make payment thereof to you or order on October 1, 1914, together with interest at 8 per cent. from maturity. Andrew S. Gilbert.

" 'Received payment pursuant to the above order.

" 'Dated this day of 1914.

" '.....'

"Which said order or request for the payment of money was on or about said date indorsed by the said Joseph M. Kimmel, 'J. M. Kimmel,' all done with the intent of him, the said Joseph M. Kimmel, to defraud one Charles C. Taylor.

"The said Herbert Rhoades, county attorney, further alleges and gives the court to understand and to be informed that on or about the 25th day of September, 1914, the said Joseph M. Kimmel, in the county of Burt and state of Nebraska, then and there being, did utter and publish as true and genuine the above named and de-

scribed made, forged and counterfeited order or request for the payment of money, knowing the same to be false, with the intent of him, the said Joseph M. Kimmel, to defraud the said Charles C. Taylor, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state of Nebraska."

The third count was in all respects the same as the second count, with the exception that the order was purported to be signed by one W. W. Eckley.

The record discloses that the orders alleged to have been forged were introduced in evidence, and appeared to have been filled out in the handwriting of the defendant. The signatures, however, were very good imitations of the signatures of Andrew S. Gilbert and W. W. Eckley, who were supposed to have executed them.

Charles C. Taylor testified, in substance, that the defendant came to his restaurant at Tekamah, in Burt county, Nebraska, on or about the 24th day of September, 1914, and sold him the orders, which defendant then and there indorsed; that he paid him their face value, less a small board bill which defendant owed him; that he paid him the balance due on the orders in question in cash and certain checks on the First National Bank of Tekamah, on which defendant obtained payment from the bank. Taylor also testified that the defendant told him not to say anything about the transaction, because it might make him trouble with his insurance company. His evidence was corroborated by the testimony of his wife and one G. C. Deck, and certain other witnesses. Gilbert and Eckley both testified that they never signed the orders in question. The defendant claimed, however, that the orders were duplicate copies of original orders which he took from Gilbert and Eckley for life insurance premiums on policies in the Bankers Life Insurance Company of Lincoln, Nebraska; that he was the agent of the company, and in order to keep track of his business he made the duplicates, which were to be returned to Gilbert and Eckley on the payment of the originals, which defendant

claimed he had sent to the insurance company. By his evidence he admitted that he imitated the signatures of the drawers of the instruments, and that he did not mention that fact to Taylor when he sold him the orders. He also claimed that he did not sell Taylor the orders, but that Taylor took them from him by force and fraud, and was holding them to force the payment of a gambling debt which defendant owed Taylor. This was denied by the witnesses for the state. He also testified that he never got any money for the orders, but the cashier of the bank testified that the defendant presented to him, at the bank counter, at least one of the checks given by Taylor for \$64, and that he paid defendant the cash for which the check was drawn. There was testimony which showed that defendant had played poker in the rooms upstairs over Taylor's restaurant, and there was some evidence which tended to show that Taylor had been conducting a game of chance, but that evidence did not excuse the defendant for his conduct in forging the instruments. In fact, the testimony of the defendant himself was so inconsistent and contradictory to his own statements that the jury were warranted in disregarding his evidence and returning a verdict of guilty against him.

Defendant contends that the court erred in overruling his motion for a new trial on the ground of newly discovered evidence. The record, on that question, contains a history of the prosecution of Charles C. Taylor on a charge of running a gambling house, and certain newspaper accounts of that prosecution. As we view the case, it was quite immaterial, and furnished no substantial reasons for granting the defendant a new trial.

Defendant also alleges error for the failure of the court to instruct the jury on the "authority to make notes." In support of this assignment he cites 12 Cyc. 615*g*, and other authorities. The citation from Cyc. reads as follows: "An instruction which, while stating the charge or the evidence against the accused, omits to charge the jury as to the defense set up by him is error, unless the

defense is properly submitted to the jury in other parts of the charge."

An examination of the instructions given by the trial court shows that the defense was properly submitted to the jury, and defendant has no cause to complain in relation to that matter. It cannot be successfully contended that the authority to make duplicates of the orders in question included the right of the defendant to imitate the signatures of the makers, and then utter and publish the instruments as true and genuine orders for payment of money, and by so doing to obtain the amount of money which they called for.

It is finally contended that instruction No. 10, given by the court on his own motion, was erroneous and misleading. That instruction reads as follows: "It is a claim made by the defendant that he did not make the notes, checks, orders or requests for money he is herein charged with having forged, as forged instruments, but that he made them as copies of genuine notes for the purpose of keeping track of his business of life insurance transactions. Unless the state establishes beyond a reasonable doubt that this theory or claim is untrue, and that the said instruments were forged for the purpose of defrauding Charles O. Taylor, you should find the defendant not guilty." This instruction was clear and explicit, and was as favorable to defendant's contention as the court could well have given.

In conclusion, an examination of the record satisfies us that the defendant had a fair and impartial trial, that the evidence was sufficient to sustain his conviction, and the judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

CHARLES E. GIBSON, APPELLEE, V. LEVI GUTRU ET AL,
APPELLANTS.

FILED MARCH 18, 1916. No. 18246.

Bills and Notes: BONA FIDE PURCHASER: FAILURE OF CONSIDERATION.

Under the facts stated in the opinion, *held*, that the plaintiff is not a holder in due course of the note sued upon, and that it is subject to any defense that might be made against it in the hands of the original owner. *Held*, further, that the defense of failure of consideration is established by the proofs.

APPEAL from the district court for Madison county:
ANSON A. WELCH, JUDGE. *Reversed*.

Albert & Wagner and H. Halderson, for appellants.

M. B. Foster, James Nichols, W. A. Meserve and Reese,
Reese & Stout, contra.

LETTON, J.

Action on promissory note, tried to the court without the intervention of a jury. Judgment for plaintiff, defendants appeal.

This is an appeal from a second trial of *Gibson v. Gutru*, 83 Neb. 718. The petition is in the ordinary form for an action by an indorsee against the maker of a promissory note. It pleads the execution and delivery of the note to the Globe Investment Company, the purchase of the note by the plaintiff on June 13, 1899, for a valuable consideration in the usual course of business, and the indorsement and delivery to plaintiff by the receiver of that corporation. The main defenses are a general denial and failure of consideration. The facts alleged are that defendant Gutru in November, 1894, purchased certain land in Box Butte county, Nebraska, from one Olson, who had theretofore executed a note for \$275 secured by mortgage on the land to the Dakota Mortgage Loan Corporation, the name of which was afterwards changed to the Globe Investment

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Company; that foreclosure proceedings were begun on this note and mortgage; that defendants, in order to renew the note given by Olson, executed the note sued upon herein and executed a mortgage on the same land to secure its payment, upon the agreement that, upon the delivery of the latter note and mortgage, the Globe Investment Company would release and surrender the Olson note and mortgage; that it failed to do this, and still retains the Olson note and mortgage, and therefore there was no consideration for the note sued upon.

The reply pleads the invalidity of the foreclosure proceedings in Box Butte county, and that defendants have sold and conveyed the land by warranty deed as if the decree were a nullity, and are therefore estopped to claim any right of defense. The court found generally for the plaintiff and rendered judgment accordingly. It is undisputed that the note was given to the Globe Investment Company in order to renew the Olson note.

Gutru bought the land subject to the mortgage and received a warranty deed dated November 12, 1894, after the *lis pendens* notice had been filed in the foreclosure suit. The application for the renewal was made in December, and Gutru paid the Globe Investment Company \$80 back interest through one Miller, signed the new note and mortgage, and also a commission note and mortgage for \$41.25, as a part of the same transaction. Afterwards Miller informed him that the company wanted him to pay \$19 additional costs in the foreclosure suit, which he refused to do, and stated that, if they would not renew the note as they had agreed, they should return the money paid and the new note and mortgage. This was never done.

The testimony of the plaintiff is that he purchased the note in suit on October 21, 1896, with other loans from one Chaplin; that Chaplin held a prior mortgage given by Olson; that while the note in suit was in the hands of the Globe Investment Company it failed, and a receiver was appointed; that a dispute arose between the receiver and

plaintiff as to certain sums claimed to be due the company on account of the Chaplin loans, and that plaintiff came to terms with the receiver, who on June 13, 1899, indorsed the note and delivered it to him. Plaintiff testified: "I did not buy the Gutru note and coupons from the receiver of the Globe Investment Company. The said receiver never claimed to me that he owned said note and coupons, and never offered to sell me the same."

The question is whether Gibson was a purchaser in due course, for value, so that the defense of failure of consideration may not be made against him. The note was not payable to Chaplin, but was made payable to the Globe Investment Company. It was never delivered to Chaplin. Chaplin was the owner of the prior note and mortgage. The receiver testified that the record of the investment company showed that loan No. E-323, the Olson note and mortgage, had been assigned to George W. Chaplin in 1887, and that under the same filing number, E-323, and in the same filing envelope, there was found the application signed by Olson, and the application signed by Gutru. He also testifies that he delivered the note to Gibson for the reason that he had received a letter which was produced from the administratrix of the estate of George W. Chaplin, to the effect that her father had sold all his loans in the Globe Investment Company to Mr. Gibson, and because Gibson had settled the claims of the investment company "on account of the foreclosure costs, taxes and expenses in connection with the several loans which had been sold by said Chaplin and transferred to said Gibson."

The foreclosure of the prior loan was brought in the name of one of the officers of the Globe Investment Company, which was in possession of the note and mortgage as the agent of Chaplin, and was evidently acting for him. The petition was filed on August 1, 1894, a notice of *lis pendens* and a cross-petition of the Globe Investment Company were filed on the same day. A summons was issued, but was not served because the fees of the officer were not

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paid in advance. An alias summons was issued on August 27, directed to the sheriff of Madison county. The return shows personal service on Olson in that county. On September 19 a special appearance was filed by Olson objecting to the jurisdiction of the court, and "that the copy of summons hereto attached" is the only copy served upon him and is not a certified copy. No copy is attached to the affidavit. On November 1, 1894, a defective summons was issued and served on Olson. Nothing further appears to have been done until April 2, 1895, when the record recites that the case came on to be heard; "The defendants, except the Globe Investment Company, not appearing. * * * The court finds that due and legal notice of the filing and pendency of this action was given each of the said defendants, and that they have failed to appear and plead in said cause in the time and manner provided for by law." A default was adjudged against Olson, and a decree of foreclosure rendered.

The finding that defendant Olson had been duly served with summons overruled the special appearance, which was unsupported by proof.

It would seem (but since others not parties to this suit are interested we do not so decide) that the court had jurisdiction to render the decree. The land afterwards was duly sold under the decree, the sale confirmed on August 30, 1895, and a deficiency judgment rendered against Olson.

The facts with reference to the foreclosure suit are really immaterial under the issues in the case, except in so far as they corroborate the other proof that there was an absolute lack of consideration for the note sued upon in this case. The fact that Gutru sold the land after the foreclosure is also immaterial under the issues.

Since the Globe Investment Company, acting for Chaplin, had taken the note from Gutru, when it was directed to return it, it was still the property of Gutru, and neither Chaplin nor that company had any interest in it. Gibson was not a holder in due course of business under the stat-

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ute, and any defense that might be made against the note in the hands of Chaplin or the investment company is valid against Gibson. The judgment is therefore erroneous.

If the evidence in this case, as seems probable, is identical with that adduced in the first trial, the trial judge was warranted in directing a verdict for defendant at that time, and the commissioners and this court, as shown by the opinion in 83 Neb. 718, failed to apprehend its true purport.

The judgment of the district court is

REVERSED.

JOHN J. FLANNERY, APPELLEE, v. MICHAEL FLANNERY,
APPELLANT.

• FILED MARCH 18, 1916. No. 18640.

1. **Deeds: DELIVERY: INTENT: PROOF.** The intention to deliver a deed must be shown by acts or words, or by both combined.
2. ———: ———: ———: **DETERMINATION.** "Delivery of a written instrument like a deed is largely a question of intent to be determined by the facts and circumstances of the case." *Brown v. Westerfeld*, 47 Neb. 399.

APPEAL from the district court for Holt county: R. R. DICKSON, JUDGE. *Reversed and dismissed.*

A. P. Lillis and E. H. Whelan, for appellant.

J. A. Donohoe, contra.

ROSE, J.

The action is ejectment for the northeast quarter of section 18, township 30, range 15 west, Holt county. The parties are brothers. Plaintiff relies on a deed executed by his father and mother August 17, 1909. Defendant

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pleaded that the deed was never delivered; that his father, John J. Flannery, died intestate September 29, 1909; that his mother died intestate September 19, 1910; that defendant was appointed administrator of his father's estate June 1, 1912, and that he is in possession of the premises as heir and administrator. The reply, in substance, contains the plea that the father and mother, August 17, 1909, for the purpose of dividing their real estate, executed and delivered three deeds, one to plaintiff for the land in controversy, one to defendant for a different quarter and the other to Thomas Flannery, another son, for an 80-acre tract; that, September 21, 1910, at a meeting of the heirs, consisting of the three sons and three daughters, plaintiff, to equalize the division so made, paid defendant \$2,000; that the latter retained the money thus paid with the understanding that the transaction should constitute a settlement binding on all of the heirs; that defendant is estopped from disputing plaintiff's title. The issues were tried without a jury. From a judgment in favor of plaintiff, defendant has appealed.

The first question presented is the delivery of the deed under which plaintiff claims title. The grantors, John J. Flannery and wife, occupied the premises as a homestead. They had three sons and four daughters. One of the daughters died November 7, 1908. Thereafter the father talked about giving the sons land and the girls money. August 17, 1909, he and his wife went to Stuart, where he consulted an attorney, who drew the three deeds described in the reply. All were executed and acknowledged by both grantors. In the evening, after they returned, while plaintiff and defendant were in the kitchen, their father took the deeds from a pocket in his coat, and laid them on the table, saying, according to plaintiff, "Here are those deeds," and, according to defendant, "Those are the deeds." Each picked up a deed, read the one in which he was named as grantee and replaced it on the table. The father told defendant to put the deeds in the former's tin box where he kept his papers. Defendant did as directed. Both

before and after the deeds were executed the box was kept in the bedroom occupied by the father. They remained there, unrecorded, until after his death. They were warranty deeds; no life estate for the father or the mother being reserved. The day following their execution, the father said he did not want them recorded until after his death. He expressed a purpose to change them. He had said he intended to retain and to control his real estate as long as he lived. The children all understood that. They also understood that their mother would have the same right, if she survived their father. After the alleged delivery upon which plaintiff relies, the father managed the land and received the proceeds thereof until his death. The mother survived, and defendant managed the farm for her. The son Thomas was in Canada August 17, 1909, the date of the delivery pleaded by plaintiff. The facts and conclusions thus narrated are established by uncontradicted evidence. Did plaintiff acquire title August 17, 1909, by a delivery of the deed in which he was named as grantee? Did his father by a valid delivery lose control of the warranty deed and thus divest himself of all interest in his homestead, according to the terms of his warranty, without reserving a means of livelihood?

Delivery is essential to the validity of a deed. The intention to deliver a deed must be shown by acts or words, or by both combined. *Brittain v. Work*, 13 Neb. 347. The rule in this state is: "Delivery of a written instrument like a deed is largely a question of intent to be determined by the facts and circumstances of the case." *Brown v. Westerfield*, 47 Neb. 399.

In the present case the intention essential to a delivery is not shown. The father retained possession of the deed. He said it should not be recorded until after his death. There was no change in possession, control, use, or benefits. The father continued to exercise rights at variance with a transfer of the fee. His acts and expressed purposes, both before and after the execution of the deed, are inconsistent with an intention to deliver it. There was

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no manual delivery or an expressed intention to make one. The facts and circumstances proved do not warrant a finding that the father intended to deliver the deed to plaintiff when he laid it on the table. Proof of a subsequent delivery is not shown. On the contrary, the undisputed evidence shows conclusively that the deed was never delivered.

It is contended, further, that defendant is estopped to deny plaintiff's title and right of possession. This plea is based on an alleged settlement under which plaintiff paid and defendant retained \$2,000. Since the deed on which plaintiff relies was never delivered, he has no legal title and cannot maintain ejectment. Each party's interest in the land is that of an heir, plaintiff being entitled to credit for the amount contributed by him to the improvement of his father's estate upon discharging and satisfying any apparent incumbrance created by him.

The judgment of the district court is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

FAWCETT, J., not sitting.

HENRIETTA OWENS, APPELLEE V. TRAVELERS INSURANCE
COMPANY, APPELLANT.

FILED MARCH 18, 1916. No. 18767.

Insurance: PREMIUMS: PAYMENT: WAIVER. In an accident insurance policy, a provision requiring payment of the premium in advance may be waived by a course of dealings in which insured, through a series of renewals, paid each renewal premium long after it became due, having been thus induced to believe that payment in advance would not be required.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Affirmed.*

Gurley, Woodrough & Fitch, for appellant.

James C. Kinsler and Dunham & Aye, contra.

ROSE, J.

This is an action by plaintiff, as beneficiary, to recover \$5,000 upon an accident insurance policy issued by defendant upon the life of her husband, John S. Owens. The policy was issued September 30, 1910, for a term of three months, in consideration of a premium of \$6.25, and provided that "it may be renewed, subject to all the provisions of the policy from term to term thereafter by the payment of the premium in advance." Owens was accidentally killed October 24, 1912. The premium for the term commencing September 30, 1912, had not been paid, and defendant denied liability on the ground that the policy had lapsed. Plaintiff alleged that defendant had waived the provision of the policy requiring payment of the premium in advance. A verdict was rendered in plaintiff's favor for \$5,586.92 and judgment entered thereon. Defendant has appealed.

The controlling question on appeal is whether defendant waived the provision of the policy requiring payment of the premium in advance. The evidence shows that defendant maintains a general branch office in Omaha. The cashier is appointed by, and acts under the direction of, the home office in Hartford. There is a general manager in Omaha who has charge of writing insurance. To procure applications a number of agents are employed. While they remain in the employ of defendant, they collect the premiums upon policies procured by them. After they leave the employ of defendant the cashier makes the collections. Collections are reported to the cashier, who enters payment on a card record and makes daily reports to the home office. Receipts for premiums, countersigned by the cashier, are delivered to the agents at the beginning of the term, with instructions to return them to the branch office within 60 days or to bring in the money. If receipts are not returned

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within 60 days, the agents must pay the premiums. Policies were not canceled for nonpayment of the premium until 60 days after due. D. J. Sinclair, an agent of defendant, solicited Owens to make application for an accident policy. Owens was not ready to take a policy, but did so when the agent informed him that he need not pay the premium for 60 days. Though the policy was issued September 30, 1910, the premium was not paid until December 27, 1910. The insurance was renewed from time to time, but the premiums were not paid until the expiration of periods extending from 65 to 87 days after due. Sinclair testified that he generally called on Owens pay-day, leaving the receipt for the premium whether then paid or not, and making collection, if not paid, later. Plaintiff testified that pay-day was the sixth of the month, and also that she saw Sinclair deliver a receipt to her husband 30 days or more after the premium became due. Sinclair left the employ of defendant in August, 1912, but it does not appear that Owens was aware of that fact, nor of the rule that the cashier made the collections after the soliciting agent left. Demand for payment of the premium due September 30, 1912, was made by a letter dated September 17, 1912, signed by the cashier, and containing the following: "Renewal premium of \$6.25 on Policy No. E-181,706 issued by the Travelers Insurance Company of Hartford, Connecticut, is due on the 30th day of September, 1912. Please forward remittance in season to reach my office on or before the date above named." The premium was overdue 24 days when Owens was killed. The morning after his death, the premium was received without knowledge of that fact, and defendant tendered it back.

The law applicable to this case has been stated in *Insurance Co. v. Wolff*, 95 U. S. 326, 330, as follows:

"The principle that no one shall be permitted to deny that he intended the natural consequences of his acts when he has induced others to rely upon them is as applicable to insurance companies as it is to individuals, and will serve to solve the difficulty mentioned. This principle is

one of sound morals as well as of sound law, and its enforcement tends to uphold good faith and fair dealing. If, therefore, the conduct of the company in its dealings with the assured in this case, and with others similarly situated, has been such as to induce a belief that so much of the contract as provides for a forfeiture if the premium be not paid on the day it is due would not be enforced if payment were made within a reasonable period afterwards, the company ought not, in common justice, to be permitted to allege such forfeiture against one who has acted upon the belief, and subsequently made the payment. And if the acts creating such belief were done by the agent and were subsequently approved by the company, either expressly or by receiving and retaining the premiums, the same consequences should follow."

For nearly two years defendant had accepted from Owens premiums 65 days or more after they had become due. These payments were entered by the cashier on the card record of the branch office and reported to the home office. Defendant knew the course of dealings with Owens. While there is testimony that the premium receipts were delivered to Owens and payment made later, there is also testimony from which the jury might infer that these receipts were not delivered in some instances until 30 days or more after the premium had become due. When Owens was killed the premium had been unpaid but 24 days. It had been the practice of defendant to send the agent to Owens to collect the premium. It is not shown that Owens knew that the agent had left the employ of the insurer, or that the custom to call for the premium would be abandoned, or that collection would thereafter be made by the cashier. The notice from the cashier that the premium was due September 30, 1912, and asking for a remittance on or before that date, in view of the course of dealings described, did not necessarily amount to notice that payment at a later date would be rejected and the former practice abandoned. Defendant was willing to, and did, receive payment of the premium. While this was not of

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itself a waiver, since defendant did not then know of the death of the insured, it is proof tending to show that defendant had not changed its course of dealings and was willing to receive the premium after it had become due and after the date mentioned in the cashier's notice. Under the evidence it was at least a question for the jury whether "the conduct of the company in its dealings with the assured in this case, and with others similarly situated, has been such as to induce a belief that so much of the contract as provides for a forfeiture if the premium be not paid on the day it is due would not be enforced if payment were made within a reasonable period afterwards." This view is in harmony with adjudicated cases: *Cornell v. Travelers Ins. Co.*, 104 N. Y. Supp. 999 (affirmed without opinion in 192 N. Y. 587); *Morgan v. Northwestern Nat. Life Ins. Co.*, 42 Wash. 10, 7 Ann. Cas. 382; *Boutin v. National Casualty Co.*, 86 Wash. 372.

The instructions of the court are in harmony with the views herein expressed. There is no error in the record, and the judgment is

AFFIRMED.

SEDGWICK, J., not sitting.

UNION PACIFIC RAILROAD COMPANY, APPELLANT, v. W. L.
STICKEL LUMBER COMPANY, APPELLEE.

FILED MARCH 18, 1916. No. 18453.

1. **Carriers: FREIGHT CHARGES: LIABILITY.** The mere acceptance from a carrier and removal of a shipment of goods, by one who is not the consignee named in the bill of lading, does not of itself create a primary obligation on the part of the one receiving such goods to pay charges beyond the amount stated and claimed by the carrier at the time of such acceptance and removal.
2. ———: ———: ———. In such case, where the failure by the carrier to collect the full amount of the freight charges, as fixed by the tariffs on file in the office of the interstate commerce com-

mission, is the fault of the carrier, it must first look to the consignor with whom it contracted to make such shipment, and who was also the consignee named in the bill of lading, for any balance due thereon.

APPEAL from the district court for Buffalo county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

Edson Rich, B. W. Scandrett and Thomas F. Hamer,
for appellant.

N. P. McDonald, contra.

FAWCETT, J.

This action was brought to recover a sum alleged to be due as a balance of the freight charges upon four shipments of lumber transported by plaintiff and connecting carriers from points in other states to points in Nebraska. Each of the four shipments is set out in the petition as a separate cause of action. The first cause of action, being barred by the statute of limitations, has been abandoned. The case was submitted to the district court upon an agreed statement of facts, and defendant recovered as to the other three causes of action. Plaintiff appeals.

The brief of plaintiff states that there is no substantial difference in the facts involved in the three causes under consideration, and that a statement of the facts in one will suffice for all. The second cause of action is therefore treated in the brief as the basis for the discussion of the whole case, and will be so treated by us. The motion for a new trial raised but one question, viz., whether the judgment of the court on the stipulated facts is correct, and that is the only question discussed here. It appears from the statement of facts that shortly prior to January 27, 1909, defendant purchased from the Falls City Lumber Company of Spokane, Washington, one car-load of white pine lumber, to be delivered by the Spokane company to defendant, at Elm Creek, Nebraska, at an agreed price; that at the time of the purchase the Spo-

kane company requested defendant to pay the amount charged by the railroad company for transportation of the lumber on its arrival at destination and deduct the charges so paid from the purchase price. On or about the date named, the Spokane company shipped the car from Troy, Idaho, *via* Silver Bow, Montana, to Elm Creek, but, instead of consigning it to defendant, it consigned it to itself, viz.: "Falls City Lumber Company, Elm Creek, Nebraska. Notify W. L. Stickel Lumber Company." The lumber was transported by plaintiff and the connecting carriers to Elm Creek, and on its arrival plaintiff presented to defendant a bill for the transportation charges, charging 46 cents per hundred pounds, for 50,500 pounds, amounting to \$232.30, that amount and weight being the amount and weight shown and charged in the bill of lading and the freight bill presented by plaintiff to defendant. Thereupon defendant paid to plaintiff the sum named, being the full amount charged and claimed by plaintiff, and the lumber was then delivered to defendant. The weight of the lumber was correctly stated, but the tariffs, on file in the office of the interstate commerce commission, fixed the charge for the transportation of the car, by the route named, at the rate of 60 cents per hundred pounds, which would make the true amount, which plaintiff, under the federal law, would be compelled to charge for the shipment, \$303. It is agreed that the tariffs and schedules fixing such rate had been published and filed with the interstate commerce commission, and were in full force and effect when the lumber was transported and delivered. Without knowledge that any larger freight rate than that charged in the freight bill and bill of lading was due to or claimed by plaintiff, defendant paid to the Spokane company, consignor, the full purchase price of the lumber, less the amount it had paid to plaintiff at the time of delivery. When, later on, plaintiff discovered the error which had been made in the rate charged, it demanded payment from defendant of the difference between 46 and 60 cents per

hundred. Upon payment being refused, this action was instituted.

The argument of plaintiff is that under the law, as it existed at the time, there was but one charge which a carrier in interstate commerce could lawfully collect, viz., the one fixed by the tariffs on file with the interstate commerce commission. This is conceded. That it is not only the right, but the duty, of plaintiff to collect the difference between the amount paid and the legal rate must also be conceded. The question here is: To whom must plaintiff first look for this balance? It is contended by plaintiff that, when the lumber was delivered to defendant, plaintiff parted with the lien which it had upon the lumber for its lawful charges, which raised an obligation in the form of an implied promise on the part of defendant to pay the freight charges in full; not the charge made by the freight bill, which was an unlawful charge, but the charge fixed by the tariffs. Cases are cited by plaintiff, and *Union P. R. Co. v. American Smelting & Refining Co.*, 202 Fed. 720, is liberally quoted from, to sustain its contention. The decision in that case was in the circuit court of appeals, eighth circuit. The opinion by Sanborn, J., is a strong and well-reasoned opinion, but the facts in that case and this are not the same. In that case the defendant was the consignee named in the bill of lading. The first paragraph of the syllabus shows that the bill of lading itself contained the stipulation, "The consignee or consignees paying freight." The holding of the court was that an implied contract by the consignee to pay the freight under a bill of lading containing such a stipulation, or any similar provision, arises from the acceptance by the consignee of the delivery of the goods under the bill, because the consignee knows that the carrier looks to him for the charges, and by delivery waives its lien therefor in the faith that the consignee will pay them. The difference between that case and the one at bar is this: In that case the goods were consigned to the defendant and contained the provision that the consignee

was to pay the freight; while in this case the lumber was not consigned to defendant, but was consigned by the Falls City Lumber Company to itself, and the bill of lading did not contain a stipulation that defendant was to pay the freight. Indeed, it made no reference to defendant as being in any manner liable for the payment thereof. The only reference to defendant contained in the bill of lading was, "Notify W. L. Stickel Lumber Company." There was nothing in this to indicate to plaintiff that defendant was the owner of the shipment, or in any manner interested in it except as agent for the consignee named in the bill of lading. We think, therefore, that the cited case is clearly distinguishable from the case at bar.

We have not overlooked *Texas & P. R. Co. v. Mugg*, 202 U. S. 242, and *Louisville & N. R. Co. v. Maxwell*, 237 U. S. 94. In the *Mugg* case the question involved was the right of the shipper of three car-loads of coal from Coal Hill, Arkansas, to Weatherford, Texas, at a rate previously quoted by the carrier, on which the shipper relied in contracting for the sale of the coal shipped, to compel delivery of the coal to the shipper at the point of destination upon payment of the quoted rate, which the carrier had, prior to the arrival of the coal at the point of destination, discovered was a lower rate than the interstate rate in effect at the time the shipment was made. The supreme court held that the shipper was not entitled to a delivery of the coal until payment of the interstate rate was made. The decision in that case was clearly right; but the case, it will be seen, deals only with the respective rights of the shipper and carrier. In the *Maxwell* case, Maxwell desired two round-trip passenger tickets from Nashville, Tennessee, to Salt Lake City, by one route, and a return by another. He purchased the tickets at the rate quoted, which proved to be \$29.15 less, on each ticket, than the interstate rate, which it was conceded had been duly published and was in force at the time the tickets were purchased. Here, again, the case involved the rights of the original contracting parties, viz., the

passenger and the carrier. A reading of the syllabus, and of the opinion by Mr. Justice Hughes, shows that no other question was considered. The right of the carrier to collect the interstate rate, as duly fixed and published, was upheld. We are in entire harmony with the holding in these two cases; but they have no application to the case at bar. Here the right of the carrier to collect its full rate is not questioned. Nor would we question that right in a case brought by the carrier against either the consignor or consignee named in a bill of lading. In such a case both the consignor and consignee are parties to the contract of shipment, and, while the original contract may be between the carrier and the consignor, the bill of lading itself would advise the carrier that the consignee named in the bill of lading is the one who is entitled to the possession of the goods covered by the shipment; or, as stated in *Cornelius & Co. v. Central of Georgia R. Co.*, 69 So. (Ala.) 331, the railroad company would be "entitled to rely on the presumption that the consignee is the owner of the shipment." In the case at bar, defendant, as already shown, was neither the consignor nor consignee named in the bill of lading. There was nothing in the bill of lading to warrant the carrier in indulging a presumption that the title to the shipment had passed to defendant. So far as the record before us shows, the only presumption that plaintiff was entitled to indulge in this case was that the defendant would represent the consignor, who was also the consignee, when the shipment arrived at its destination. This would imply nothing more than that defendant in that respect would act as agent for the consignee in receiving the goods. We do not think that in such a case the agent would incur a primary liability for the payment of any freight beyond the amount that was demanded at the time it acted for its principal. It probably must be conceded that under the far-reaching scope of the act of congress the agent in such a case might be held to have incurred a secondary liability. Whether so or not, a question which we are not now

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called upon to decide, the duty of the plaintiff in this case is to first exhaust its remedy against the consignor and consignee before it can proceed against defendant. This holding is in no manner in conflict with the act of congress, or the holding of the supreme court of the United States in construing such act; nor will it do any injustice to the plaintiff, as it can as well pursue its remedy, primarily, against the consignor, with whom it contracted, as to pursue a third party with whom it had no contractual relations, either actual or constructive. There is nothing in the agreed statement of facts showing that defendant was the owner of the lumber, or to the effect that the words, "Notify W. L. Stickel Lumber Company," would warrant plaintiff in presuming that the defendant was the owner or the actual consignee; and for us to so hold would be to extend the liability of defendant by construction, in order to furnish a basis for reversing the judgment. This an appellate court will not do. Upon the contrary, it will indulge the presumption that the parties have deliberately put into their agreed statement of facts everything necessary to support their respective contentions.

In the firm belief that we are acting in entire harmony with the views and the reported holdings of the supreme court of the United States, the judgment is

AFFIRMED.

HAMER, J., not sitting.

WILLIAM T. KUSEL V. STATE OF NEBRASKA.

FILED MARCH 18, 1916. No. 19012.

Assault: ASSISTANT PROSECUTOR: ARGUMENT: INSTRUCTIONS. Record examined and found free from prejudicial error.

ERROR to the district court for Dawes county: RALPH W. HOBART, JUDGE. *Affirmed.*

Dolezal & Johnson, for plaintiff in error.

Willis E. Reed, Attorney General, and *Charles S. Roe*,
contra.

FAWCETT, J.

Plaintiff in error, whom we will designate as defendant, was prosecuted in the district court for Dawes county, upon an information charging him with an assault upon one Ben Norman, with a "pistol," with intent to "wound and injure." He was found guilty of "assault" and sentenced to pay a fine of \$50 and costs, from which he prosecutes error.

Defendant and Norman were driving loaded teams in opposite directions on the public highway. When they met an altercation arose in relation to "turning out." Defendant's wagon was loaded with baled hay, and the wagon of the other with coal. Defendant testified that Norman began throwing coal at him, and denied that he had any gun with him at the time. Other witnesses testified on the subject, but it is unnecessary to refer to their testimony, as there is no assignment of error on the ground of insufficiency of the evidence, and the brief concedes that defendant has not sufficient ground upon which to assail any of the rulings of the court in the admission or exclusion of evidence.

It is first urged that the information was defective by reason of the adding of the words "and injure" to the word "wound," in alleging the intent of the defendant in making the assault. We do not consider this objection serious enough to require extended discussion. It certainly was not prejudicial to defendant, as, if it had any effect at all, it was to minimize the intent of the defendant, as alleged in the information.

It is next urged that the court erred in permitting Mr. McDowell, a practicing attorney of the county, to assist in the prosecution. The appointment of Mr. McDowell was regularly made upon the motion of the county attorney. It was apparently satisfactory to defendant, as the

evidence preserved by a bill of exceptions settled on the hearing of the motion for a new trial shows without contradiction that, prior to the commencement of the trial, defendant requested the county attorney to take no part in the case himself, but to let Mr. McDowell conduct the entire prosecution. No objection was made to Mr. McDowell's acting in that capacity until after the jury had been impaneled and sworn. We think the assignment is without merit.

It is next urged that there was misconduct on the part of the county attorney in delaying the filing of the information until after the trial of two civil suits, in both of which defendant was a party and Norman figured as a witness. The bill of exceptions above referred to shows that the delay by the county attorney was at the request of defendant, who stated that the filing of the information and trial of the criminal case would prejudice him in the civil actions. He cannot complain of delay which he requested.

Misconduct on the part of Mr. McDowell in making his closing argument, in stating that certain witnesses, whose names appeared on the information, had been spirited away, is urged as error. The record of the trial does not show the making of any such statement by Mr. McDowell. It appears in the bill of exceptions above referred to. The charge is there made by affidavits filed by defendant and his counsel, which affidavits are met by a counter affidavit filed by the county attorney. In the affidavits filed by defendant and his attorney, they both state that, when Mr. McDowell made the statements complained of in his argument, defendant's counsel objected, and the trial court sustained his objection. The county attorney in his affidavit goes further, and states that the court not only sustained defendant's objection, but cautioned the jury that statements made by counsel were not evidence and should be disregarded by them. This contention must therefore fail.

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It is next complained that the court erred in giving instruction No. 3. This instruction was the one in which the jury were advised as to the material allegations in the information. The complaint is that the court used the words "wound and injure" as they were used in the information. There was no prejudicial error in this.

It is next urged that the court erred in refusing to give instructions 5 and 7, requested by the defendant. Everything in these two instructions proper to be given to the jury was given in instructions 6, 12 and 13, given by the court on its own motion.

We are unable to find any prejudicial error in the record.

AFFIRMED.

SEDGWICK, J., not sitting.

**ARTHUR B. BISHOP, APPELLEE, v. L. D. SPAULDING ET AL.,
APPELLANTS.**

FILED MARCH 18, 1916. No. 18498.

- 1. Forcible Entry and Detainer: COMPLAINT: DESCRIPTION OF PREMISES.** By section 8470, Rev. St. 1913, the complaint before a justice of the peace in forcible entry and detainer must "particularly describe the premises," and without such complaint the justice has no jurisdiction to proceed in the action.
- 2. ———: ———: ———.** If the description in the complaint identifies the premises so that an officer with the writ of restitution which contains the same description can ascertain from the writ the property intended, it is sufficient to give the justice jurisdiction.
- 3. ———: ———: ———: COLLATERAL ATTACK.** A complaint in forcible entry and detainer which alleges that the defendant is in possession of the premises described as "S. W. corner Avenue H and 21st street, East Omaha, Douglas county, Nebraska," is not void for uncertainty. If the evidence shows the defendant to be the tenant of the plaintiff, and that he has no written lease, and that the premises "always went by" the description given in the

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complaint, the proceedings before the justice will not, in a collateral attack, be held void for the alleged insufficiency of the description in the complaint.

APPEAL from the district court for Douglas county:
LEE S. ESTELLE, JUDGE. *Reversed.*

Stout, Rose & Wells and Daniel L. Johnson, for appellants.

John O. Yeiser, contra.

SEDGWICK, J.

It appears that this plaintiff had occupied premises belonging to the defendant company, and in June, 1913, the company began an action in justice court in forcible entry and detainer to recover possession of the premises. Such proceedings were had before the justice that a writ of restitution was issued by the justice and placed in the hands of Hensel, a constable, who removed the plaintiff and his family from the premises. Afterwards the plaintiff began this action in the district court for Douglas county against the constable and the company, his former landlord, and Spaulding, the company's agent, and certain other defendants, alleging a conspiracy to wrongfully remove him from the premises and to do other wrongs. The case was tried by a jury, and the plaintiff recovered a verdict and judgment against the company and its agent, Spaulding, for damages. The defendants have appealed.

The court at the commencement of the trial announced that, if the proceeding before the justice "was legal and lawful, that ends this lawsuit." Although the plaintiff was allowed to put in a mass of evidence which had no bearing upon the legality of the proceeding before the justice, the court disposed of the case upon that issue, held the justice's proceedings void, and instructed the jury to find a verdict for the plaintiff, and submitted only the question of damages.

After the complaint in forcible entry and detainer before the justice was put in evidence, the court excluded

all other evidence of the proceedings, on the objection that the complaint was void because it did not particularly describe the premises. The complaint alleged that the defendant (plaintiff in this suit) entered upon the premises as tenant of the undersigned; "that the said defendant has ever since the 20th day of May, 1913, and does still, unlawfully and forcibly detain from the undersigned possession of the following premises, situated in the county of Douglas, and state of Nebraska, and described as follows, to wit: S. W. corner Avenue H and 21st St., East Omaha, Douglas county, Nebraska." The transcript shows that the defendant therein appeared before the justice, obtained a continuance, and at the trial objected that the "description was insufficient." This objection was overruled, and he excepted. He filed a bond for appeal from the judgment of restitution, and, one of his sureties having withdrawn from the bond, the bond was not approved. Instead of perfecting his appeal, he brought this action.

The cases that have considered the sufficiency of the description of the demanded premises in actions of this kind are almost innumerable. Very many are cited in the briefs. In several of the states the statute is identical with ours, which provides:

"The summons shall not issue until the plaintiff shall have filed his complaint in writing with the justice, which shall particularly describe the premises so entered upon or detained, and shall set forth either an unlawful and forcible entry and detention, or an unlawful and forcible detention after a peaceful or lawful entry of the described premises. The complaint shall be copied into and made a part of the record." Rev. St. 1913, sec. 8470.

The conclusion of the courts generally is that in such actions the description must be such as to so identify the property demanded that the officer with a writ of restitution can ascertain from the writ itself the property intended. The description is jurisdictional, and, unless the complaint sufficiently describes the property, the justice

will be without jurisdiction and his subsequent proceedings therein void. Does this complaint sufficiently describe the property within the above rule?

In *Grant v. Marshall*, 12 Neb. 488, the complaint described a lot in Lincoln. It appeared that the defendant was in possession only of "a small room in the basement" of the building on the lot described. The court held the description sufficient, no objection having been made before the trial court. If there had been no sufficient description to give the justice jurisdiction, there would, of course, be no jurisdiction upon appeal, and the judgment of the district court would have been reversed. This, then, was a holding that such complaint was sufficient so that the justice had jurisdiction.

In *Cummings v. Winters*, 19 Neb. 719, the description was: "The N. E. $\frac{1}{4}$ of section 28, T. 7, R. 7." The court said: "The description certainly is sufficiently definite to enable any person familiar with the mode of numbering the different subdivisions of land adopted by the government to identify the premises, and this is sufficient, independently of the further statement of occupation by the defendant."

This is also held in *Devine v. Burleson*, 35 Neb. 238, in which the court said: "The premises could be established and identified by a competent surveyor without difficulty."

Under a statute which required that a complaint be filed "specifying" the land, etc., the supreme court of New Jersey held that the following description was sufficient: "The messuage or storehouse and buildings of Lulu Crossman and Charles E. Crossman, and the lot of land whereon the same is located, being fifteen feet by thirty-two feet, situate in the township of Neptune, county of Monmouth, and state of New Jersey, on the south side and edge of the south branch of Great Pond, and a short distance westward of the west line of Central avenue, which runs from Asbury avenue in West Park to said Great Pond." The court said: "Great technical nicety

is not required in the complaint, or in other proceeding in suits for forcible entry and detainer." *O'Hagan v. Crossman*, 50 N. J. Law, 516.

The same court held that "The westerly portion of the building known as 'Newings Hotel,' situate on Broadway, Long Branch City, in the county of Monmouth," was a sufficient description. *Newing v. Stilwell*, 67 N. J. Law, 96.

A complaint in forcible entry and detainer described the land, "known as the Peninsula, 'Punta del Potrero,'" and the supreme court of California held: "Where a declaration describes land by a certain name, this is as good a description as one by metes and bounds, if it can be rendered sufficiently certain by evidence. The fact that a Spanish name can be translated into English so as to mean nothing does not alter or affect its potency as a name descriptive of a place." *Castro v. Gill*, 5 Cal. 40.

That court has decided the precise point involved in this case. The description considered was a certain building "on the southwesterly line of California and Larkin streets," in San Francisco. The court said: "It is plain that the description of the premises is marred by a mere clerical error, and, if we substitute the word 'corner' for 'line,' we have a correct description of the premises involved. That the parties intended the word 'line' to be 'corner' is too plain to need argument; for the description, when read as a whole, shows the fact to be that the premises dealt with by the parties are situated on two streets, Larkin and California, and on the southwest corner thereof." *Olcovich v. Deremberg*, 27 Cal. App. 194.

If we substitute the word "corner" for "line" in that case, we have precisely the description we are now considering, which that court holds is "a correct description of the premises." The plaintiff himself testified that he had no written lease, and that "Twenty-first and Avenue H, that is the number it always went by." It seems clear that the premises in dispute might be identified from the allegation in the complaint, and that the justice of the

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peace had jurisdiction to determine who was entitled to possession.

The plaintiff says in the brief: "The defendants were advised of their want of authority and were urged not to proceed, but chose to consider appellee and his family more as animals than as human beings; and, thinking laws were made only to be obeyed and respected by the poor and to be ignored by the opulent, they put them out of their home at any cost."

The action of forcible entry and detainer before a justice of the peace is the most simple and inexpensive form of action for such purpose that the law affords. It should not be used to harrass "the poor," nor to give any advantage to "the opulent." It clearly was not so intended by the legislature. If a still more simple and inexpensive method for adjusting the rights of those not desiring, nor prepared for, litigation can be devised, or if justice requires that the public shall assume the defense of those who for any reason are unable to defend themselves, the attention of the legislature should be drawn to the matter. The remedy of an independent action of this nature in the district court does not seem to be less complicated or less expensive than the action before the justice of the peace, even if an appeal from the decision of the justice is found to be necessary. At all events, the statute as it now is intends that, if the proceedings are sufficient to confer jurisdiction upon the justice of the peace, the decision of the justice is the final determination of the right of possession, unless those proceedings are removed to the district court for review. The theory of the law is that one suit must determine which party is entitled to possession. We cannot ignore in this collateral proceeding the judgment of the justice of the peace. It follows that the district court erred in excluding the record of that judgment.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

ROSE, J., not sitting.

MILDRED HAMILTON ET AL., APPELLEES, v. NORTH AMERICAN ACCIDENT INSURANCE COMPANY, APPELLANT.

FILED MARCH 18, 1916. No. 18560.

1. **Appeal: AFFIRMANCE: INSTRUCTED VERDICT.** Upon a jury trial in district court, if each party asks an instructed verdict in his favor, the decision of the court for plaintiff will be sustained if a verdict could be sustained for plaintiff upon the evidence with proper instructions.
2. **Insurance: POLICY: CONSTRUCTION.** The word "dwelling" alone is not commonly used with exactly the same meaning as the words "dwelling house." As that word is used in the policy in suit, under the circumstances in which the insured was placed, it is capable of being understood to mean, "home or place of habitation." If the insured did so understand and the insurer had reason to suppose she so understood it, that meaning must prevail. Rev. St. 1913, sec. 7909.
3. **Appeal: AFFIRMANCE.** In this case it is not so clear that the trial court was wrong in so construing the evidence as to require a reversal.

APPEAL from the district court for Keith county:
HANSON M. GRIMES, JUDGE. *Affirmed.*

H. E. Goodall, Edward St. Clair and H. A. Dano, for appellant.

Wilcox & Halligan, Flickinger & Powell and L. A. De Voe, contra.

SEDGWICK, J.

These plaintiffs, Mildred Hamilton and Clarence Hamilton, minors, by their guardian, I. N. Flickinger, recovered a judgment in the district court for Keith county against the defendant on an insurance policy, and the defendant has appealed.

The policy was issued to the mother of these minors, and provided: "Two thousand dollars for loss of life occurring within 30 days from date of the event causing the

fatal injury, provided the assured shall sustain exclusively by the means hereinafter stated, bodily injuries, effected solely by external, violent and accidental means, and which, independently of all other causes, shall be immediately, continuously and wholly disabling, and which shall be the sole and exclusive cause of the death of the assured within the time limit of this paragraph, as follows." Then follow twelve provisions purporting to limit the liability on the policy, the fourth being:

"By the burning of a dwelling, hotel, theater, clubhouse, lodge room, school building, office building, store or barn, in which the assured may be burned by fire or suffocated by smoke, but this shall not apply to or cover the assured while acting as a volunteer or paid fireman."

The insured was a widow, who was supporting and educating, largely by her own efforts, these two young children. The evidence is that she was attempting to extinguish fire which had burned some rubbish in the rear of her dwelling house in the village of Ogallala, and while attempting to stamp out the smouldering fire her clothing became ignited. She ran to a neighboring house, and there the burning of her clothing was extinguished, and she was carried to her own house, where within a few hours she died from the effects of the burns. One witness who, from a distance of "about a block," saw the clothing of the deceased take fire, was asked: "Q. Was this fire on her own lot? A. I should think it would be in the street, but I don't know." She was also asked: "Q. Where was that fire? A. Right north of the fence around her yard; between that and the road. * * *

Q. State what she was doing. A. She had burned off the weeds and grass, and there was a little cinders that was burning, and she was walking on that and tramping it out with her feet, so that the blaze wouldn't blow over into her buildings." The defendant contends that this evidence shows that the accident happened in the street, and not on her premises. The parties each asked for an instructed verdict, and the court directed a verdict for

plaintiffs. Under the oft-announced rule, we must sustain the decision of the court if a verdict for the plaintiffs could be sustained upon the evidence with proper instructions. That is, all issues of fact will be considered as found in favor of the decision, and those findings upon conflicting evidence will not be disturbed unless clearly wrong. Within this rule it will, if necessary to support the judgment, be considered that the court found that the accident occurred upon the premises of the deceased, and such finding is not so unsupported that we can say that it is clearly wrong. It is conceded that the injury was "effected solely by external, violent and accidental means," and was within the terms of the policy, unless excluded by the limiting clause. The defendant contends that paragraph 4 of the limiting clause above quoted applies directly and precludes a recovery on the policy. The plaintiffs point out that if the 12 limiting articles are construed as defendant contends, the result is that the deceased, under the circumstances in which she was placed at the time of procuring the insurance, had practically no indemnity by the policy of which her children could avail themselves in the event of her accidental death, so that with such a construction of the policy she paid her premium practically without consideration. It is substantially alleged in the reply, which is without objection treated as alleging a substantial issue in the case, that the deceased understood when she bought the policy that her children were protected by the policy against any fatal accident that might happen to her while she was at her home; that the defendant company knew that she so understood the policy and purposely led her to rely upon the insurance with that meaning. The word "dwelling" alone is not commonly used with exactly the same meaning as the words "dwelling house." Webster's New International Dictionary defines "dwelling," as "habitation; place or house in which a person lives." The words "dwelling house" are given a much more restricted meaning. The trial court was asked to find that

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this insurance company took the money of this woman and gave her a policy in which it agreed to pay her children "two thousand dollars for loss of life occurring within 30 days from date of the event causing the fatal injury," and then followed that agreement with a long list of provisions of such a nature as to practically deprive the children of any protection whatever. The trial court considered that the use of the word "dwelling" instead of the expression "dwelling house" might reasonably be understood by the insured to include her "habitation" or home place, that the insurer had reason to believe that she did so understand it, and that section 7909, Rev. St. 1913, applies: "When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it."

Under the peculiar circumstances of this case, we cannot say that the trial court was wrong, and the judgment is

AFFIRMED.

MITCHELL S. MCININCH, APPELLEE, v. AUBURN MUTUAL
LIGHTING & POWER COMPANY, APPELLANT.

FILED MARCH 18, 1916. No. 18764.

Electricity: FRANCHISE: METER RENTALS. Where the city of Auburn, Nebraska, passed an ordinance permitting an electric lighting and power company to install and maintain a lighting plant in said city for the use of the same and the citizens thereof, and by the terms and conditions of said ordinance, which the company accepted, it was to furnish a meter for the use of each of the consumers to measure the electricity furnished by said company, and while the rate at which the light should be furnished was set forth in the ordinance, there was no provision in the ordinance to the effect that any rental should be charged for the use of said meter, it will be considered that the meter should be furnished by the company to the consumer free of charge and as a necessary part of the equipment of the company's plant.

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APPEAL from the district court for Nemaha county:
JOHN B. RAPER, JUDGE. *Affirmed.*

Neal & Armstrong and H. A. Lambert, for appellant.

McIninch & Rankin, contra.

HAMER, J.

This is an appeal from a judgment of the district court for Nemaha county. It is alleged by the plaintiff, and appellee, that he brings this case in his own right and at the instance of numerous citizens of Auburn for the purpose of procuring a judicial construction of section 5, of Ordinance No. 189, of the Revised Ordinances of the city of Auburn, and to settle a controversy between the citizens of Auburn and the defendant company; that the plaintiff brought the action while he was city attorney for said city of Auburn. The plaintiff alleges that the defendant, the Auburn Mutual Lighting & Power Company, is a corporation organized for the purpose of furnishing electric light and power to the said city of Auburn and to the inhabitants thereof, and that it has its principal place of business in said city; that the city of Auburn is a municipal corporation organized under the laws of Nebraska as a city of the second class, and being in the county of Nemaha, and state of Nebraska; that the plaintiff is a resident and citizen of said city, and patron of the defendant company; that on the 12th day of July, 1901, said city passed and approved Ordinance No. 189, authorizing and empowering said defendant company to furnish electric light and power to said city and to the citizens thereof under the provisions and according to the terms of said ordinance, a copy of which is attached to the petition and made a part thereof; that on the 1st day of August, 1901, the said company filed with the city clerk of said city of Auburn its acceptance of the terms and provisions of said Ordinance No. 189; a copy of said acceptance is also attached to the plaintiff's petition; that at the request of the plaintiff said company caused to be

placed on the premises of the plaintiff's landlord, and for the use of plaintiff in measuring the amount of electricity consumed by him, a meter, which said meter ever since the placing of the same has been used by the plaintiff for measuring the electricity consumed by him for lighting purposes in his office at Auburn; that said meter was in use by the plaintiff in measuring the electricity so consumed by him for light during the months of October, November and December, 1913; that on the 2d day of January, 1914, said defendant company by its manager, E. E. Elliott, demanded of the plaintiff the sum of 25 cents a month for the use of said meter for said months of October, November and December, 1913, or the sum of 75 cents for said services in payment of rental for the use of said meter, which demand the plaintiff refused, and continues to refuse, to pay; that, because of such refusal, the said Elliott, acting on behalf of said company, threatens to, and is about to, take out and remove said meter, and will deprive the plaintiff of the use of the same or any means of measuring the electricity consumed, thus causing great and irreparable injury; that, unless said defendant is restrained from removing said meter, it will remove and take the same away from the plaintiff, and will deprive the plaintiff of light in his office, to his great and irreparable injury; that said action on the part of said defendant in collecting, and attempting to collect, rent for said meter is in violation of, and in conflict with, the terms and provisions of said ordinance. The plaintiff prays for a temporary order of injunction restraining the defendant from removing said meter until final hearing of this cause, and then that the injunction heretofore granted shall be made perpetual, and that the plaintiff may recover his costs.

The part of the ordinance relating to the subject under consideration reads: "Section 5. The rates charged to consumers of light or power shall be such as to enable said company to pay such part of costs of construction as may not be covered by sale of stock, its organizing expenses,

the cost of maintaining its light and power system, and an annual dividend to its stockholders of not more than 12 per cent., under the condition that the said electric light and power company shall charge subscribers for lights not to exceed 75 cents per month for all night service or 55 cents per month for midnight service, per sixteen candle power; or when sold on the meter basis, not to exceed 15 cents per thousand watts, and it shall be compulsory upon said electric light and power company to put in electric meters when required by patrons of said company. The city of Auburn shall not be charged a higher rate for either light or power than the rate charged private citizens."

Application was made to the county judge, who granted a restraining order enjoining the defendant from removing the meter described in the petition, upon the plaintiff executing an undertaking in the sum of \$50. The record shows that the understanding was executed and approved, and subsequently that there was a motion made before the district court to dissolve the restraining order, and that the motion was overruled.

The defendant answered that the petition did not state facts sufficient to constitute a cause of action, and admitted the passage and approval of the ordinance; also admitted that at the request of the plaintiff it installed a meter for the plaintiff for the use of electricity for lighting purposes; and that it did on or about the 2d day of January, 1914, threaten to remove said meter because said plaintiff refused to pay a reasonable charge for meter rental, but denied that such charge was in conflict with or in violation of said ordinance. The answer further alleges that shortly after the passage of the ordinance, and about the time that the defendant entered upon the business of furnishing electricity for light and other purposes, it adopted and promulgated a rule wherein it required patrons who desired electricity furnished them by meter to deposit the sum of \$12 to cover the cost of putting in and establishing an electric meter for said

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purpose, or, where said deposit was not made, said rule required the patron taking electricity by meter measurement to pay the sum of 25 cents a month as meter rent; that said rule was just and reasonable, and that the meter rent charged was no more than sufficient to pay reasonable interest upon the money expended for purchasing and installing a meter and the cost of reading, inspecting and caring for the same; that the plaintiff for many years had been a patron of the defendant, and had knowledge of the said rule long previous to the time he requested the defendant to install the meter mentioned in the petition; that several years before said time the defendant had installed in the plaintiff's residence a meter, and at said time notified the plaintiff of the said rule, and the plaintiff at that time elected to, and did, make the deposit mentioned; that, after the meter mentioned in the petition was placed and installed for the plaintiff, the plaintiff for seven months paid said 25 cents a month as rental, and when he requested and had said meter put in he knew of said rule, and by said request agreed with this defendant to pay said rental; that at the time of the approval of said ordinance and the acceptance of the same by the defendant, there existed a usage throughout the state of Nebraska in cities of the class of Auburn having electric light plants that, in addition to the charge made for the electricity furnished, the lighting company did make a reasonable charge per month as rent for meters, and that this usage generally prevailed and was well known to the parties to said contract at the time the same was made; that it was contemplated at the time of making said contract that the defendant would have the right to make a reasonable charge as rent for meters or to require a deposit therefor; that this charge should be in addition to the sum charged for electricity furnished.

The plaintiff filed a reply. On the 28th of April, 1914, the court rendered its judgment finding for the plaintiff and against the defendant. The facts alleged by the plaintiff in his petition were found to be true, and the

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court held that the effort of the defendant to collect rental for the use of the meter was in violation of the said Ordinance No. 189, and rendered a judgment in favor of the plaintiff. The court specifically found that the rule of the company requiring the deposit of a certain sum of money in place of the meter was a violation of the ordinance.

The plaintiff, McIninch, testified that he had no other means of measuring the electricity to be consumed for the purpose of lighting his office except this particular meter, which the defendant threatened to remove unless the plaintiff paid the rental demanded; that his office was his place of business, and that he had no other means of lighting his office except by electricity; that he was frequently required to be in his office at night and to use the lights, and without the lights he would be greatly damaged, and without the meter he would have no means of ascertaining how much electricity was consumed; that Mr. Elliott, representing the defendant company, called at his office and demanded that he pay the rental charge, and stated that, if he did not do so, he would take the meter away and deprive him of the use of it. Elliott also stated at the same time that he had taken out the meter of Mr. William B. Smith, a patron of the company at Auburn. McIninch also objected because, if the meter should be taken out, it would deprive him of the meter rate and would increase his electric light bill; that without the meter he could not have the benefit of the meter rate.

Evidence was introduced which tended to show that in some of the towns where there is electric light there is a custom to charge for the use of the meter.' Whatever the custom may be in certain towns in the state, the ordinance only contemplates a charge for the electricity used. The ordinance fixes the maximum rate that the defendant can charge for the use of electricity at 15 cents per 1,000 watts. The provision concerning the putting in of meters reads: "And it shall be compulsory upon said

electric light and power company to put in electric meters when required by patrons of said company." So far as we can see, the defendant was obliged to put in the meters when requested to do so. It was a burden which the defendant assumed when the ordinance was passed and it accepted it. The plaintiff requested defendant to put in the meter.

In *Smith v. Birmingham Water Works Co.*, 104 Ala. 315, 325, there was an action to enjoin a private water company from cutting off the plaintiff's water supply and from removing a meter. The court, among other things, said: "In all cases where the defendant has the right to charge for water by measurement, and demand pay for water furnished, it is incumbent on the respondent to furnish meters." The court said the fact that the water company had the right to charge and collect by measurement fixed the matter of furnishing the meter, and the company had to do it.

When the article sold is sold by measurement, the only practicable way in which to ascertain the quantity sold is by the use of a meter. This would imply that the meter is part of the necessary equipment of the company.

In *Albert v. Davis*, 49 Neb. 579, it was held, in substance, that a grant of power to fix and collect charges for the use of water meters excludes by implication the power to compel consumers to furnish their own meter.

In *Spring Valley Water Works v. City and County of San Francisco*, 82 Cal. 286, 6 L. R. A. 756, 16 Am. St. Rep. 116, it was held that an ordinance requiring that the corporation furnishing water shall provide the means necessary for its measurement is not an unreasonable regulation. The court added that the expense of the meter could not be imposed on the consumer. The ordinance provided: "All persons owning or occupying houses used for any purpose shall have the right to determine whether they shall receive and pay for water supply under the meter rates, and on notification to the person, company or corporation so supplying water, to furnish and place a

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meter within a period of thirty days to register the water supply, and thereafter shall charge only for the water so used;" etc.

The ordinance, together with the report of the California case cited above, including the opinion of its supreme court, may be found in Municipal Reports of San Francisco, 1888-1889, page 242, and on page 268 of said report, at paragraph 4, is the language of the court in construing the section of the ordinance quoted. There is cited in support thereof *Red Star Steamship Co. v. Jersey City*, 45 N. J. Law, 246.

An electric light plant in the position of the defendant in this case becomes a public service corporation whenever the ordinance is passed and its terms are accepted. There seems to be no provision in the ordinance that the company has any authority to collect for the use of meters or to demand a deposit in place of the meter. We cannot add to the conditions of the contract.

The judgment of the district court is right, and it is

AFFIRMED.

SEDGWICK, J., not sitting.

ETTA GIFFIN, APPELLANT, V. GRAND LODGE, A. O. U. W.,
ET AL., APPELLEES.

FILED MARCH 18, 1916. No. 18656.

1. **Insurance: BENEFICIARY: DIVORCEE.** A wife named as beneficiary in a fraternal benefit certificate, who thereafter procures an absolute divorce, without accruing alimony, forfeits her rights to such benefits where the law of the state or the by-laws of the society restrict the payment of its benefits to the families, heirs, blood relations, affianced wife, or persons dependent upon the member.
2. **Interpleader: ACTION ON BENEFIT CERTIFICATE.** The act of a fraternal society in filing a bill of interpleader to determine conflicting claims is proper, and cannot prejudice the rights of claimants, when the same are fixed by law.

APPEAL from the district court for Buffalo county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

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Thomas F. Hamer and J. M. Easterling, for appellant.

H. M. Sinclair and W. D. Oldham, contra.

MARTIN, C.

Thomas Coppinger was a member in good standing of the Grand Lodge of Ancient Order of United Workmen, a fraternal insurance society, organized under the laws of this state. On the 25th day of June, 1901, the society through its subordinate lodge at Gibbon, Nebraska, issued to him a certificate for \$1,000, wherein the plaintiff, then his wife, was named as beneficiary. On August 25, 1912, the plaintiff obtained an absolute divorce from said Thomas Coppinger, and on the 4th day of March, 1913, said Coppinger died. No change of beneficiary was made in the benefit certificate after the plaintiff procured her divorce. She brought this action against the society to recover the amount of the benefit certificate. The defendant society paid the amount of this benefit certificate into court on an order of interpleader granted on its own showing and motion. The interpleaded defendants are the sisters and brother of said Thomas Coppinger, deceased. The interpleaded defendants had judgment for the amount of the benefit certificate less the sum of \$130.40, which it was shown that plaintiff had paid as dues upon the said certificate. The plaintiff was allowed an equitable lien upon the benefit certificate fund for the amount expended by her in keeping the benefit certificate in force. From that decision the plaintiff is here on appeal.

Thus it appears that the controversy here is between the divorced wife and the heirs of the insured. The contract of the parties is made up of the benefit certificate, the by-laws and constitution of the society, and the laws of the state under which said society is organized. Authorities need not be cited to the point that all these are elements which constitute the contract as a whole. The insured and the insuring society are alike bound by

them. Nor need cases be presented to support the well-established proposition that in benefit societies the beneficiary at the time of the issuance of the certificate acquires no vested interest therein, but that the same is simply an expectancy.

Section 96 of the laws of said society is as follows: "Each member shall designate the person or persons to whom the beneficiary fund due at his death shall be paid, who shall in every instance be one or more members of his family or some one related to him by blood, or his affianced wife."

This section was strictly complied with by the designation of the member's wife as his beneficiary. Under the doctrine laid down by some of the authorities that a designation of beneficiary valid in its inception remains so, we might be called upon to reverse this case, if it were not for the laws of said society and the statutory law of the state relating to such subject. Section 98 of the laws of said society provides that, if the beneficiary named in the certificate shall die during the lifetime of the member and the member shall have made no other direction, the benefit shall be paid to his widow, and, in case he leaves no widow surviving him, then said benefit shall be paid to his children or blood relatives, etc. It is argued that the only contingency provided for in this section is the death of the beneficiary during the life of the member, and that divorce is not death. This section fixes the order of payment, and it should be construed in a way to effectuate the intention of the society. When the law severs the bonds of matrimony, the relationship of husband and wife is broken as effectually as if death had removed one of the parties.

Section 3298, Rev. St. 1913, is as follows: "Payment of death benefits shall only be made to the families, heirs, blood relations, affianced husband or affianced wife of, or to persons dependent upon the member."

Said sections of the society are clearly a limitation upon the insured, and require him to designate as his benefi-

ciary some one related to him as in the said sections provided, and to whom the beneficiary fund due at his death shall, and can, be paid. These provisions of the society's laws and the section of the state law referred to are a prohibition against the payment of any certificate by the society to any person who does not belong to those classes or bear such relationship to the insured at the time of his death. A former wife who secured an absolute divorce from the insured without accruing alimony does not come within such classes or bear such relationship, consequently she is not qualified or eligible to receive benefits from this society.

"A person who is not eligible as a beneficiary under the statute is not entitled to the fund even though named as beneficiary, and in such case the heirs of the deceased member are entitled to the fund." *Grand Lodge, A. O. U. W., v. Ehlman*, 246 Ill. 555.

It is evident from the laws of this order that its object is to provide benefits for the families or dependent ones of its members. To permit such benefits to be paid to persons who do not sustain the prescribed relationship to the insured at the time of his death would surely thwart the purpose of the organization. *Kirkpatrick v. Modern Woodman of America*, 103 Ill. App. 468; *Green v. Green*, 147 Ky. 608, 39 L. R. A. n. s. 370; *Green v. Knights & Ladies of Security*, 147 Ky. 614; *Knights of Columbus v. Rowe*, 70 Conn. 545; *Larkin v. Knights of Columbus*, 188 Mass. 22.

In the case of *Dunmore v. Modern Woodmen of America*, No. 18598 (decided by commission and findings of fact journalized but not published) we held that a "wife named as beneficiary in a fraternal benefit certificate, who thereafter procures an absolute divorce, forfeits her rights to such benefits where the by-laws of the society restrict the payment of its benefits to the wife, surviving child, heir, blood relative, or person dependent upon, or member of the family of the insured, at the time of his death." In the foregoing case the by-laws of the society

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restricted payment to persons sustaining certain relationships to the insured, whereas in the instant case the statute makes such restriction.

Under the prohibition of the statute, the divorce obtained by the plaintiff from the insured operated to revoke the designation of her as a beneficiary in the certificate, and to substitute in her place those next specified under the by-laws of the order and the law of the state, which persons in this case are the interpleaded defendants.

The contention on the part of the plaintiff that objection to the ineligibility of the beneficiary named in the benefit certificate can be raised by the society alone is not in accord with the better reasoned cases, as we view them. The society simply pays the money into court on the order of the court, and asks to be relieved from litigating, as between two sets of claimants. The aid of the court is invoked to determine which of the claimants is entitled to the fund. This we understand to be a proper case for interpleader. The statute of this state prohibiting payment to anyone not belonging to the classes therein designated fixes the rights of the parties. This being true, claimants in good faith under the laws of the state and those of the society cannot be prejudiced by the act of the society in asking the court to determine their rights.

"The fact that the beneficiary named in a certificate is not eligible is not an objection such as the society alone can raise, as the rights of the parties are fixed by law and are not affected by the action of the society in filing a bill of interpleader to determine conflicting claims." *Grand Lodge, A. O. U. W., v. Ehlman*, 246 Ill. 555; *Supreme Council of Royal Arcanum v. McKnight*, 238 Ill. 349. It follows that the judgment should be affirmed.

BY THE COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and this opinion is adopted by and made the opinion of the court.

AFFIRMED.

LUCY G. REESE ET AL., APPELLANTS, v. CITY OF LINCOLN, APPELLEE.

FILED APRIL 1, 1916. No. 18523.

Municipal Corporations: LIABILITY: ACTS OF OFFICERS. Where a property owner, or a person contemplating the purchase of property, within a city, visits the office of the city engineer, who is the custodian of the maps, plans and surveys of the city, for the purpose of ascertaining the cut to be made in grading the street in front of the property, but does not understand the technical language and method of making the records, and thereupon requests and receives the advice and assistance of the engineer in an interpretation thereof, the engineer in giving such assistance and interpretation, in the absence of ordinance or statute making it his duty to do so, acts outside the scope of his duties, and the city is not liable for damages sustained because of any erroneous information given by the engineer under such circumstances.

APPEAL from the district court for Lancaster county :
P. JAMES COSGRAVE, JUDGE. *Affirmed.*

Wilmer B. Comstock, for appellants.

C. Petrus Peterson, Charles R. Wilke and Sterling F. Mutz, contra.

MORRISSEY, C. J.

This is an action to recover \$2,500 for damages to plaintiffs' property at Twentieth and C streets, Lincoln, alleged to have been caused by the grading of C street. The petition, in substance, alleges that before purchasing the property plaintiffs went to the office of the city engineer and informed him of their intention to purchase the property, provided that the grades of the streets adjacent thereto were not lowered so as to materially injure the property; that the city engineer exhibited the maps, plans and sketches pertaining to C street, but was informed by plaintiffs that they could not determine therefrom to what extent C street would be lowered from the natural grade;

that thereupon the city engineer informed plaintiffs that C street would not be excavated to a greater depth than 18 inches in front of the property; that, relying upon such information, plaintiffs purchased the property and made improvements thereon of the value of \$15,000; that prior to the injury complained of the property was worth \$25,000; that subsequently and before signing the petition for paving C street, plaintiffs again inquired at the office of the city engineer for information as to the depth C street would be excavated; that they were shown the maps, sketches and plans; that they informed the city engineer that they could not determine therefrom the information they desired; that thereupon the city engineer informed plaintiffs that the finished surface of the pavement in front of their premises on C street would not be more than 14 inches lower than the natural surface of plaintiffs' lots; that to further explain the matter the city engineer caused stakes to be set on C street showing where the finished pavement would be; that, being unable to determine from such maps, plans and sketches to what extent the street would be excavated, plaintiffs relied upon the information furnished by the city engineer and signed the petition for paving; that "thereafter defendant negligently and unlawfully, and in fraud of plaintiffs' right, changed the grade of C street between Nineteenth and Twentieth streets, and in front of plaintiffs' lots, and, contrary to the representations aforesaid, defendant cut said C street in front of plaintiffs' lots to a depth of about * * * four feet below the natural surface of said lots;" that plaintiffs' property was thereby rendered unsightly and unattractive and difficult of access from C street, and its value was permanently lessened, to plaintiffs' damage in the sum of \$2,500; that plaintiffs filed their claim for damages within the time required by law. Defendant demurred to the petition. From an order sustaining the demurrer and dismissing the action, plaintiffs have appealed.

The principal question presented is whether a city is liable in damages for an error of the city engineer in ex-

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plaining to a lot owner the municipal plan and public profile for the grading and paving of an abutting street. The argument in support of municipal liability is that the making and improving of streets is a corporate function; that the city engineer has the duty of making plans and profiles of the established street grades, and has the custody of the same in his office, and that in improving the street he is acting for the city in its corporate capacity. The argument is not conclusive. It may be granted that in the performance of a corporate duty the doctrine of *respondet superior* applies to municipal corporations, but to render the master liable for the negligence of the servant the latter must have been acting within the scope of his duties. Was the city engineer acting in the performance of his duties to the municipality, or was he performing an act outside of his duties, when he gave plaintiffs information regarding the established street grade in front of their property. The city charter prescribed the duties of the city engineer:

"The city engineer shall make record of minutes of his survey and of all work done in his department for the city, * * * and accurately make such plats, sections, profiles, maps, plans, details and specifications necessary in the prosecution of any public work, all of which shall be public records and shall belong to the city, and shall be turned over to his successors." Rev. St. 1913, sec. 4500.

"The city engineer shall * * * make all surveys, estimates and calculations necessary to be made for the establishment of grades, * * * and perform such other duties as the council may require. Before the council shall * * * enter into any contract for * * * any work or improvement to cost over two hundred dollars, he shall make and submit to the council an estimate of the total cost thereof, together with detailed plans and specifications, and, if approved by the council, such plans and specifications shall be returned to the city engineer and kept subject to public inspection." Rev. St. 1913, sec. 4501.

It will be presumed the legislature knew that engineers in making "plats, sections, profiles, maps, plans, details and specifications" perform their duties according to technical rules and methods of their profession, and that technical representations may not be understood by the public in general. The statute has imposed no duty upon the city or the city engineer to explain them to the public. While they become part of the public records of the city and are to be kept subject to public inspection, no duty is imposed upon the city or city engineer to give information as to their contents. In giving such information the city engineer acted outside the scope of his duties. He was acting for the plaintiffs, and not for the defendant.

In *Waller v. City of Dubuque*, 69 Ia. 541, it was held: "A city is not liable for the negligence or want of skill of its civil engineer in the performance of a duty the benefit of which is to accrue solely to an individual, and not to the city in its corporate capacity; and so the defendant city is not liable for the mistake of its engineer in incorrectly informing the plaintiff as to the established grade of the street adjacent to his lot, though an ordinance of the city made it his duty to give such information, for a named fee to be paid by the person desiring it." This rule is followed in *Sargent v. City of Tacoma*, 10 Wash. 212.

Plaintiffs rely upon *City of Youngstown v. Moore*, 30 Ohio St. 133. In that case evidence was held competent showing that the city engineer had misinformed plaintiff as to the established grade when plaintiff called at the office pursuant to a published notice "inviting all persons interested in property abutting on the streets to be improved to call and examine them, with a view to their filing claims for damages." The result of the engineer's act was that plaintiff failed to file a claim for damages within the designated time. The liability of the city for damages for grading the street already existed, and did not arise from any act of the city engineer in giving the information. It merely excused plaintiffs' delay in making claim for dam-

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ages. The decision of the Ohio court is not controlling in this case.

The defendant is not liable for damages sustained because of erroneous information given by the city engineer. The judgment is therefore

AFFIRMED.

ROBERT PARMALEE V. STATE OF NEBRASKA.

FILED APRIL 1, 1916. No. 18986.

Rape: SUFFICIENCY OF EVIDENCE. Evidence examined, its substance set out in the opinion, and *held* sufficient to sustain the verdict of the jury.

ERROR to the district court for Lincoln county: HANSON M. GRIMES, JUDGE. *Affirmed.*

Reese, Reese & Stout and E. H. Evans, for plaintiff in error.

Willis E. Reed, Attorney General, and Charles S. Roe, *contra.*

MORRISSEY, C. J.

This is an error proceeding from the district court for Lincoln county, where defendant, Robert Parmalee, was convicted of the crime of rape on the person of Minnie Thiede, a female child under the age of 18 years, and over the age of 15 years, with her consent. The crime is alleged to have been committed April 10, 1914. A number of assignments of error are set out in the brief, but the principal complaint is that the evidence is insufficient to sustain the verdict.

The defendant was 26 years of age at the time of the acts complained of, and had been employed as foreman or manager of a ranch. Prosecutrix had been living at this ranch,

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assisting with the housework and attending school. About the 1st of April, defendant left the Hansen ranch and went to another farm, or ranch, located a mile therefrom, where it would appear he was to engage in business for himself. April 10 defendant and prosecutrix were present at a party at a nearby farm. They were among the last to leave. According to defendant's theory, he did not regard himself as her escort and did not get her horse for her; but, when he had saddled his horse and made ready to leave the premises, he found her already mounted and ready to join him. He admits they rode together for some distance, until they reached a turn in the road which would take him to his home, but says that he there left her to proceed to the Hansen ranch alone.

She testifies that he accompanied her to the Hansen ranch; that on the way he suggested that they have sexual intercourse, and she refused; that on arriving at the ranch they went into the barn; he turned his horse loose, and she proceeded to unsaddle her horse; that he took hold of her and coaxed her to have sexual intercourse with him, and that she finally consented and the first act of intercourse between them took place; that he returned to the Hansen ranch from time to time thereafter until the 20th of the month, and that during this time she had intercourse with him once in the barn and three times in the house. She remained at the Hansen ranch until the 28th of April, when, after arriving at the schoolhouse, she became sick with an attack of vomiting. That she went from the schoolhouse to a neighbor's, and from there she was taken to a hospital in North Platte by her mother and sister; that the doctor made an examination of her and found her pregnant. The child was not born at the time of the trial, but her pregnancy seems to be admitted. She testifies that he was the only man with whom she had ever had intercourse.

It is not clear whether the Hansens were at home at the time of the alleged intercourse on April 10, or whether they had not yet returned from North Platte, where they had spent the evening. On the other occasions of which she

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testifies, she says that he came to the place evenings, after she had returned from school, and when Mr. and Mrs. Hansen were away from home. The testimony shows that the Hansens kept an automobile, and were away from home a good deal during that period. Mr. Hansen was called as a witness for the defendant, and testified that he did not see defendant at the ranch on any of the occasions mentioned by the prosecutrix, but his testimony is of a merely negative character and does not show that her testimony in that regard is untrue.

In May following she called on defendant where he was cultivating corn and charged him with being responsible for her condition. Their version of the conversation differs somewhat. She says that he said: "He would never marry me. He said that if he had to marry me he would treat me like a rattlesnake. He said a man could treat a woman in such a miserable life that she will take her own life, and he said he did not want me to say anything to mamma about this business; and he said for me to come in and he was going to send me to Broken Bow, Nebraska, and have this child knocked, and he told me to be in at 9 o'clock in the evening on the south side of the bandstand in the courtyard."

He admits that she called on him and told him she was in trouble, and says that he asked her why she called on him, and she replied that she thought he might help her, and that he asked, " 'Why don't you go to Charlie Russell.' I says, 'Wasn't he caught in the room with you?' And she says, 'Well, yes; but he never did anything.' I says, 'Well, why don't you marry him?' She says, 'I don't want to.' " That she then asked him if he would help her, and he replied, "Well, I will consider this proposition over. * * * I told her then a certain length of time to meet me down here by the courthouse and I would tell her what I had considered. I wanted to counsel somebody whether it was right for me to help her or not. And that was the end of our conversation."

Subsequent to this a bastardy proceeding was instituted, and the prosecutrix, her mother and sister went to the county attorney's office, and the county attorney and defendant met, and the county attorney sent defendant to his office, with the suggestion that a settlement be effected. The three women testify that in that conversation defendant admitted that he was responsible for her condition, and offered to pay \$200 in settlement if they would keep the matter out of court; that no settlement was made, and a few days thereafter defendant approached them on the streets of North Platte and again made an offer of settlement; that the girl's mother demanded that a marriage ceremony be performed; that defendant declined; that he held up his hands and said, "Fight it. * * * Pen for me." He admits making an effort to effect a settlement, but he says that this was done owing to the suggestion of the county attorney and his desire to protect his name and keep out of court.

At the hearing in the bastardy proceeding, the prosecutrix testified that the first act of intercourse was had in the afternoon of April 14 in the barn, and she made no mention whatever of what she now alleges occurred some days before on the return from the party heretofore mentioned. Counsel for defense lay much stress upon this feature of her testimony, which she admitted upon this trial to be untrue. It is, of course, a circumstance to be taken into consideration in weighing her testimony. But it must be remembered that she was a young girl, inexperienced in court procedure, in a delicate state of health, and probably testifying for the first time; and prompted somewhat by the natural disposition to shield herself from blame. She failed to tell of this occasion in which she now admits that she consented to the intercourse, but charged her trouble up to the act committed on the afternoon of the 14th, when she insists that she resisted his embraces. After reading in full the testimony which she gave before the jury and her testimony given at the bastardy proceeding, we still

believe the jury was warranted in finding the story told on this trial to be true.

It is rarely, if ever, possible to furnish direct corroboration of the principal fact; but, in this case, they were seen together late at night on the date she alleges the first act of intercourse occurred. That opportunity existed on the other dates she alleges is clearly evident from all the testimony. Before the expiration of a month her pregnancy was discovered by the doctor who examined her, and she is not shown to have been in company with any other man who might be the author of her trouble. Defendant admits that he had agreed to consider what he would do for her, and to meet her in North Platte. These facts, together with his own version of the conversations taking place in the office of the county attorney and on the streets of North Platte, are sufficient corroboration.

But defendant, in addition to denying that he ever had improper relations with the girl, argues that she was not previously unchaste, and that the verdict ought to be set aside for that, if for no other, reason. He testifies that on two separate occasions he saw her having intercourse with a man employed on the ranch, named Wesley Randall, and inferentially charges that another man, named Charlie Russell, employed on the ranch, had been found in her room, but states nothing definite as to Russell. The story he tells as to finding her and Randall together is entirely lacking in corroboration. He claims to have had this knowledge for nearly two years and never to have mentioned it to any person until he told it on the witness stand. He was not without the benefit of counsel, and must have known that, if true, this would be a defense. He made no effort to subpoena either Russell or Randall, but trusted to his own uncorroborated statement to blacken the reputation of the girl he was charged with having debauched.

In support of a motion for a new trial, defendant filed affidavits calculated to support his contention that prosecutrix was previously unchaste, but these affidavits are so vague and indefinite that if the statements therein con-

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tained had been made to the jury it is not likely they would have been given any serious consideration.

Complaint is made because the court refused to give instructions No. 1 and No. 3 requested by defendant. But the substance of these instructions is covered by the instructions given by the court on its own motion, and these assignments are not well taken.

The verdict is fully sustained by the evidence. The record is free from error, and the judgment is

AFFIRMED.

SEDGWICK, J., dissents.

HAMER, J., concurring.

I have read all the evidence. The prosecutrix was a young girl at school. She was 9 or 10 years younger than the defendant. He was 26, and was in charge of the Hansen ranch. The girl was staying at Hansen's and was working for her board while she went to school. Mr. and Mrs. Hansen were away a part of the time in California. The girl was at Hansen's three years. The defendant had been there and in charge of the ranch for five or six years. The prosecutrix was unable to adequately defend herself against the defendant.

On the night of April 10, 1914, the prosecutrix went to a party at Calhoun's, about two miles south of Hansen's. She went there on horseback. There may be some doubt about the defendant going there with her, but after reading the evidence the writer thinks not. They rode back on horseback, and were among the last to leave Calhoun's. The defendant denies that he was in the barn with the prosecutrix after their return from Calhoun's. The defendant at that time claimed that he had moved over to Beach's place. He seems to have taken charge of the Beach ranch. The defendant claimed at that time to have left the Hansen ranch permanently. He claimed that prior to April 1, or about that time, he had moved his colts and machinery from the Hansen ranch down to Beach's place. According to the testimony of the prosecutrix, the defendant seems

to have frequently gone back to the Hansen ranch. Her testimony concerning the fact that he still kept his clothes at the Hansen ranch seems to corroborate her other testimony as to the relations between them. During the three years that she was at Hansen's there was only a short period when she was gone, and the defendant testified that he could not remember when that was. He admits going to the party at Calhoun's with Miss Thiede, the prosecutrix, but says that she came by the Beach place on her way home from school and asked him to go with her. And he testified: "I didn't say a word. I turned around and walked away. I went to the house." He saw her again that same day. He testified she came to the Beach place where he was; that she was riding a gray saddle horse, which she put in his barn, and then came up to the house and waited for him until after he dressed for the party; but he told her that she could go if she wanted to. He seems to have testified to that as an excuse for going with her. He says that they were the last to leave Calhoun's the night of the party. He says he met her just outside the door, and that she came along with him, and that they passed Arthur Qualley. He denied going home with her. He testified that she branched off at the schoolhouse and cut across the meadows and went home, while he came straight north up the Tryon road to his place; and he denied going to Hansen's place that night. She appears to have daily passed him when he was at work on the Beach ranch. She was on her way to and from school, and he said, "I never paid any attention to it."

After she found out that she was pregnant she visited him in the cornfield, and asked him if he could not help her. He said: "Well, I will consider this proposition over." He then arranged to meet her at the courthouse. Would he have done this if he had not regarded himself as the father of the unborn child? This testimony corroborates the evidence of the prosecutrix. The defendant offered to settle up the case. That is a further corroboration of the testimony of the prosecutrix. He met the prose-

cutrix and her mother and sister. He was ready to fix the matter up. What he said would probably not have been said by an innocent man. He was ready to pay \$200. He had it fixed to get the money, so he testified. This would seem to be a corroboration of the testimony of the prosecutrix and sufficient to establish the defendant's guilt.

When asked if he had not said that he was sorry the affair had arisen, he admitted he had. He talked with the prosecutrix and her mother and sister. He testified: I told them that I was sorry that this trouble had come between us." Is a man likely to get very sorry if the woman is just lying on him? He gets angry if the woman lies on him without any cause, and he gets sorry when she tells the truth and there is a serious difficulty to meet. He was sorry because of the condition of affairs and because of the baby to be. He was sorry he had gotten into trouble by being guilty. That was the kind of sorrow that had hold of him. When she visited him in the cornfield to tell of her condition he was in a great hurry and had no time to listen to her, but he did listen. When she stood down before him he said he could not wait. He testified: "I had my work to do." It was not his work that was bothering him, it was the trouble of this girl and their prospective baby. "Q. What did she talk about? A. Why, she just sat there and never said a word. Q. Did you say anything to her? A. No." The thing he was called on to meet was trouble. He knew what was the matter. That was what kept him silent for half an hour. Then he began to manufacture his defense, and to threaten her with Charles Russell, and perhaps Wesley Randall. When a man does an indefensible thing and there is a woman who is going to suffer because of his wrong, then he begins to abuse the woman and to fabricate and spread dirty slanders about her. To defend himself he testified to what he says he saw between the prosecutrix and Russell, and also Randall. According to his story no attention was paid to him, although he was close to the guilty pair and called out in a loud voice. A child or a foolish person could have invented a better story

than he did. Its untruthful character is at once apparent. When he had an interview with the prosecutrix and her mother and sister, he invented the story concerning Randall to justify himself in not marrying the prosecutrix. He testified that he told them, "It makes no difference now whether I have did this crime or not, but, I says, you have got me now into it and I am willing to come to any terms to blot this off of my name; my name has been blotted." They said, "We want you to marry Minnie." He testified that he said, "No. I think we ought to come to some other kind of agreement." Then he starts out with Minnie's alleged improper conduct with Randall as an excuse for not marrying her. The Randall story is as intangible as the Russell story, and both are unreasonable in the extreme. Randall had not been seen for a long time, not since he was going away. Besides, defendant did not report her misconduct to any one, although he was in charge of the ranch. Neither did he discharge Randall. When asked why he did not discharge him, he said because "he was a pretty good man." Of course Randall left, and the defendant does not know where he is. He never tried to get him as a witness, and never knew where he was.

At the Calhoun party the prosecutrix waited for the defendant, so he says, and they started home together. "It was awful cloudy and very dark," so he testified. He further testified that it probably was a gentleman's duty to go home with her, and then he thought, "I have got my work to do. I will go on home. It is late." Was it natural to do that on a night that was so awful cloudy and very dark, or to ride with her and then stop at Hansen's barn to help her put the horse away? The girl says he went all the way to Hansen's with her, and then that he stopped at the barn. The girl's story as to what happened is natural and reasonable, and it rings like the truth. The girl was at the barn, too. She told all about what happened in the barn. He let his horse run loose. Then he was inconsistent and had matters his own way.

Several affidavits were filed touching the alleged bad character of the prosecutrix. They were filed after the defendant had been tried and convicted. The persons signing these affidavits do not set forth a sufficient reason for not testifying. Diligence in preparing the case for trial is not shown. If these persons who make the affidavits were ready to testify to the things set up in them, then they should have been looked for and found and subpoenaed and brought in as witnesses to attend the trial and testify. The story they tell does not seem to have favorably impressed the judge before whom the case was tried. He refused to grant the new trial applied for. No error is shown in his refusal. He was closer than we are to the persons who attempted to swear away the good character of this young girl. In these affidavits, of course, there was no opportunity for cross-examination. The affidavits do not favorably impress the writer with their truthfulness, and no sufficient excuse is given for the failure to find these proposed witnesses before the trial. This young girl was struggling to maintain herself by the labor of her hands while she obtained an education. She was entitled to the sympathy and help of all who knew her. The defendant, who was much her senior, should have guarded and protected her, instead of plunging her into shame and disgrace. If men mislead and deceive women, and especially young girls, and break faith with them and make them drink the bitter dregs of disappointment, disgrace and dishonor, then there should be no hesitation upon the part of the courts to enforce the law and to punish those who break it.

CHARLES R. McAVOY, APPELLEE, v. MARION OSBORN,
APPELLANT.

FILED APRIL 1, 1916. No. 18847.

1. **Replevin: DAMAGES: REMITTITUR.** In an action of replevin, where the jury has returned a verdict for the defendant, based on conflicting evidence, fixing an excessive value to the property in controversy, which excess the defendant offers to remit, it is ordinarily the duty of the court to order a remittitur and render a judgment on the verdict.
2. ———: **JUDGMENT OF DISMISSAL.** If, however, the court, after setting aside the verdict, makes a finding that there was fraud in the bill of sale under which the plaintiff claimed the right to the possession of the property, and that the parties should be left in the situation in which they were at the commencement of the action, it is error to dismiss the case, and thereby leave the plaintiff in possession of the property which he has obtained by means of the writ.

APPEAL from the district court for Keith county: HANSON M. GRIMES, JUDGE. *Reversed.*

Hoagland & Hoagland and L. A. De Voe, for appellant.

H. A. Dano, G. E. Junge and C. J. Campbell, contra.

BARNES, J.

This was an action in which the plaintiff obtained possession of a certain merry-go-round by a writ of replevin. The petition was in the usual form, and the answer was a general denial. On the issue thus joined there was a trial to the jury, and the defendant had the verdict. A motion for a new trial was sustained, and thereupon the court entered a judgment as follows:

"This cause came on for hearing before the court on this 30th day of March, A. D. 1914, being one of the days

of the regular March, 1914, term of the district court of Keith county, Nebraska; Honorable H. M. Grimes, presiding. The cause is heard upon the motion of the plaintiff heretofore filed praying for a new trial in said cause. Upon consideration whereof, and the court being fully advised in the premises, the court finds that the contract between the plaintiff and defendant as to the property involved herein was fraudulent; that both the plaintiff and defendant participated in the fraud; that the verdict is excessive, and said verdict is set aside; that, because the plaintiff and defendant in the transfer of the property from the defendant to the plaintiff were each guilty of fraud, neither is entitled to any relief, and each are regularly to be left in the position that they placed themselves in by their fraud. It is therefore considered and adjudged by the court that this cause of action be and the same is hereby dismissed, and the costs of each party are to be paid by themselves; to each of which findings of fact and the judgment of the court both the plaintiff and the defendant except. It is further ordered that both the plaintiff and defendant be allowed 40 days from the rising of the court to prepare and present their bill of exceptions in this cause."

The defendant has appealed to this court, and contends, among other assignments of error, that the court erred in his findings, and in his judgment dismissing the action, because the plaintiff had obtained possession of the property in controversy by the writ of replevin, and by the judgment of dismissal the property was left in the plaintiff's possession; whereas, by the findings of the court neither party was entitled to any relief. The judgment complained of gave plaintiff the possession of the property which he had obtained by the writ of replevin.

It appears from the record that the question submitted to the jury was the *bona fides* of a certain alleged bill of sale made by the defendant to the plaintiff. On the one hand, it was claimed that the bill of sale was made in fraud

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of the creditors of the defendant, while, on the other hand, it was contended that it was not fraudulent, but was made for a valuable consideration which plaintiff paid to the defendant. It also appears that defendant had peaceable possession of the property at the time it was taken from him under the writ of replevin and turned over by the officer to the plaintiff. The jury were properly instructed, and the verdict was based on conflicting evidence. It would therefore seem that the trial court erred in setting aside the verdict. The record shows that the value of the property as fixed by the verdict was excessive, but the defendant offered to remit such excess, and therefore the court should have ordered the remittitur and rendered a judgment on the verdict.

The court, by its findings, however, held that the bill of sale was fraudulent and void, and on that finding predicated his judgment of dismissal. It is apparent that the court overlooked the fact that by virtue of the writ of replevin the plaintiff had obtained possession of the property, and therefore the parties were not in the position in which the court found them, and, if the judgment should be affirmed, the plaintiff will be given possession of the property by means of the writ.

The findings of the court should have the same effect as the findings of the jury on which they based their verdict, viz., that plaintiff is not entitled to retain the possession of the property which he obtained under the writ. Therefore, the judgment should be reversed, and the cause should be remanded, with directions to either render a judgment on the verdict or order the return of the property to the defendant and dismiss the action.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

SEDGWICK, J., not sitting.

PERRY L. FULLER, APPELLEE, v. CHICAGO & NORTH-
WESTERN RAILWAY COMPANY, APPELLANT.

FILED APRIL 1, 1916. No. 18184.

1. **CARRIERS: DUTIES: SHIPMENT OF LIVE STOCK.** It is the duty of a common carrier to furnish safe and suitable cars to be used in shipping animals, and for failure to do so the carrier is liable, if damages result by reason of such failure.
2. ———: **LIABILITY OF INITIAL CARRIER.** Where a defective car is furnished by an initial carrier for the transportation of animals to a point beyond its own line, and injuries are sustained by the animals by reason of such car being out of repair, the initial carrier is liable for such damages, in the absence of any proof of negligence by the connecting carrier.

REHEARING of case reported in 98 Neb. 727. *Former judgment of reversal set aside, and judgment of district court affirmed.*

LETTON, J.

Rehearing of case reported in 98 Neb. 727. In the former opinion it was held that the plaintiff could not recover for any injuries occurring to his horses on the line of the Union Pacific Railroad Company, for the reason that a judgment had been rendered in the action in favor of the Union Pacific Railroad Company and against him on the issues. In the motion for rehearing, and on the argument, our attention was called more particularly to the principle that an initial carrier is liable for all damages occurring due to a defective car furnished by it, although the injuries may have occurred upon the line of a connecting carrier.

The testimony on behalf of plaintiff is that some of the horses were injured by falling through a defective loading chute at Ewing. There is also testimony that the door of one of the cars in which the horses were loaded was broken

and loose; that there was no "bull-board" to keep the animals from the door after they were loaded; and that there was a board broken off at the corner of the car about 18 or 20 inches long. Plaintiff testifies that when the car arrived in Grand Island the horses' legs were skinned and swollen, and there was hair on the boards of the car showing where their legs had slipped through. For the defendant, the conductor admits there was a "bull-board" missing, and testifies that he procured some wire and wired the car in several places to protect the door. He and other witnesses for the defendant deny that the car was broken or defective in any way at the time the horses were loaded, or when it left Norfolk. We are satisfied that there is sufficient evidence to support a finding that the car was defective at the time it left Ewing.

Complaint is made of the giving of instruction No. 12, to the effect that, if the jury found "that the defendant company negligently failed to provide a safe and suitable car for the transportation of the horses, and that the car furnished was defective, then the defendant company would be liable for any damages to the stock resulting from the defective condition of the car, whether said damages occurred on its own line or on the line of the Union Pacific railroad." This was not erroneous. It is the duty of a common carrier to furnish suitable and proper cars to be used in shipping live stock. *Chicago, St. P., M. & O. R. Co. v. Deaver*, 45 Neb. 307; *Union P. R. Co. v. Langan*, 52 Neb. 105; *Allen v. Chicago, B. & Q. R. Co.*, 82 Neb. 726. If damages result for failure to do so, the carrier is liable. The principle of law applicable in this case is clearly stated in 2 Hutchinson, Carriers (3d ed.) sec. 499, as follows: "Where the vehicle is furnished by an initial carrier for the transportation of goods to a point beyond his own line, and he negligently violates his duty by furnishing a vehicle which is defective, he will be liable for any subsequent damage arising from the defective condition of the vehicle, although such damage develops on the line of a connecting carrier. And this rule will remain true even though the

initial carrier expressly confines his liability for damages to his own line." A number of cases announcing this principle are collected in the note to *Atlantic C. L. R. Co. v. Riverside Mills*, 31 L. R. A. n. s. 7, at page 81 (219 U. S. 186) ; 4 R. C. L. p. 879.

There is no proof of any injury occurring on the line of the Union Pacific railroad. The horses were injured, and their appearance, when unloaded, indicated the injuries had been suffered some time before; the blood having caked and dried upon their legs.

It is urged there was no competent evidence of damages to the horses on which a verdict could be based. Plaintiff testified, without objection, that there was a difference of \$35 between the value of one of the animals before it was injured and afterwards, and gave like testimony as to the others. The claim inspector for the Union Pacific Railroad Company was sent to examine the horses, according to the custom of that company. He examined the stock, and testified, without objection, to the amount that each injured animal was damaged. Defendant requested an instruction to the effect that, if the jury believed three of the horses were injured at the loading chute, they might under the evidence find a verdict for plaintiff to the amount of \$75. Having let the evidence in without objection as to its competency, and having requested an instruction based upon the theory that it was competent, defendant cannot now urge that the court erred in its reception. We find no prejudicial error in the record.

The former judgment of this court is set aside, and the judgment of the district court is affirmed.

JUDGMENT ACCORDINGLY.

BARNES and HAMER, JJ., dissent.

MARY J. MORIARTY, APPELLEE, v. ROME MILLER, APPELLANT.

FILED APRIL 1, 1916. No. 18633.

Master and Servant: INJURY TO SERVANT: ASSUMPTION OF RISK. In an action to recover for personal injuries sustained prior to the passage of the workmen's compensation act (Laws 1913, ch. 198), a woman employed to clean and scrub the floors of a café who was thoroughly familiar with the work, and had known for a long time that metal caps for beer bottles often fell and were found upon the café floor, assumed the risk of injury from kneeling upon one of such caps while in the performance of her work, and her employer is not liable for a personal injury caused thereby.

APPEAL from the district court for Douglas county:
GEORGE A. DAY, JUDGE. *Reversed.*

Edgar M. Morsman, Jr., for appellant.

Smyth, Smith & Schall, contra.

LETTON, J.

This is an action for personal injuries. Plaintiff recovered a verdict and judgment for \$2,500. Defendant appeals.

The defendant is the owner of the Millard hotel in Omaha. The plaintiff is a scrub woman who was employed there. She had been employed in that capacity for about two years prior to the night of January 7, 1913. She usually began work at midnight. It was her duty to scrub three cafés and other rooms, which occupied her time until morning. She was supplied by the housekeeper with a pad or pillow stuffed with curled hair upon which she placed her knees while at work. A porter was employed, whose duty it was to sweep the rooms and pile the chairs upon the top of the tables out of her way just before she began to scrub. He worked from room to room, and she followed him. A bar was connected with the hotel, in which intoxicating liquors were sold. At night,

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after the bar was closed, it was the custom for beer to be served to customers in the café. The bottles of beer were stored in a refrigerator in one of the rooms and were brought by a waitress from there to the café. A hook or device was attached to a shelf or post, wherein the metal caps could be inserted and jerked from the bottles. The beer was then poured into teapots and served to the customers. This plan was pursued in order to evade the 8 o'clock closing law of the state. A cigar box was placed underneath the device in order to catch the caps as they fell.

Plaintiff testified: "Q. Did you see it before you got hurt? A. No, sir. Q. In the work that you had done there in the dining room before this, had you ever before run across these beer tops laying on the floor as you did your scrubbing? A. I often run across one, but I always avoided it. I did not see it on this night. * * * Q. Had you seen any beer tops on the floor that night prior to the time you got hurt? A. No, sir. Q. Now, you say that you had seen these beer caps on the floor there many times; now you had not seen them there very many times, had you, Mrs. Moriarty? A. I saw them very often, and I did not pay attention because they did not bother me before this. Q. You mean to say that you saw them there on the floor many times before this night that you were hurt? A. Before I was hurt? Q. Before you were hurt? A. Yes. * * * Q. Before now, when the beer caps that you say you saw on the floor, you saw them—were they always in one place or scattered about the floor? A. I did not see them scattered about the floor. I would always see them on one spot. Q. That is the place where you were hurt that night? A. Just right when I was finishing that I got hurt. Q. It was right at that same place where you were hurt? A. Yes, sure."

Her testimony is that on the night of Saturday, January 7; she was just finishing one of the rooms; that she pulled the scrub pail toward her and it splattered suds upon the floor; that she took the rag to wipe it up; that

her right knee was upon the pad, but her left knee came upon one of the beer caps, lying with the corrugations upward, which cut through her skirt, underskirt and underclothing, and cut her knee; that she took the cap from her knee and laid it upon a shelf and proceeded with her work; that this happened about a half hour or an hour after she commenced work. She testifies that, after the porter had swept the floor in this room, the waitress passed through and opened a bottle of beer on the hook; that she worked until 7 A. M., when she found that a flannel pad upon her knee was all bloody, and she had to loosen it with water, and that the print of the cap was on the knee just below the pad. The knee became sore that day. She continued to work up to Thursday night, although her knee had become greatly swollen, but was unable to finish on account of pain, and went to bed on Friday morning. The house doctor was called, and the knee was placed in a plaster cast for five or six weeks. She was confined to her bed for weeks, and when she left the hotel in July she was still obliged to use a crutch. The knee appears to be permanently partially stiffened. The testimony of the house physician, who is a son-in-law of the defendant, is that he was called on January 16, and found plaintiff with a badly inflamed knee, and that after she left the hotel in July he saw her again, and the knee was still swollen, discolored and painful, with little motion. Another physician called by plaintiff testified that he examined the leg just before the trial and found it still stiff and painful upon motion; that he was present when another physician took an X-ray picture. After having made an examination, and with the aid of the X-rays, he testified that there was a new bone formation around the cartilage and the joint, which limited the motion of the knee. The X-ray photographs were introduced in evidence. The doctor who took the photographs testified that there was a small piece of foreign matter, apparently steel or iron, in the soft tissues of the knee, close to the patella, or just below it, about the size and breadth of a carpet tack without a

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head, and that the inflammation induced by the presence of this substance "would produce a chronic inflammation, probably acute at first, or if the poison kept up it would become chronic, depending on the length of time it went." He also said that the bony growths were probably caused by inflammatory conditions. The house doctor testified that when he was first called the skin was not broken, there was no scar or opening, and there was no place where any pus exuded at any time while he treated the knee.

Plaintiff produced a metal cap which she says caused the injury. It bears the name of the Metz Brewery. The evidence for the defense tended to prove that no beer had been purchased from or delivered to the Millard hotel from the Metz brewery for a long time prior to the accident. But it was not conclusively shown that a bottle of Metz Brothers beer could not have been opened in the café that night.

A number of assignments of error are made. We think it unnecessary to discuss them in detail. Her own testimony shows that Mrs. Moriarty was fully aware of the fact that beer caps were often to be found on the floor at or near the place where she says she was injured. It was the duty of the porter and her to clean and scrub these rooms. She knew that the waitress had pulled a beer cap after the porter had swept and left the room, and that it was not improbable that the cap might fall at or near the place where she was working. The proper performance of her cleaning duty seems to require that a scrub woman should look at the floor she is cleaning and pick up any waste matter or articles which have dropped on it. It seems clear to us that in scrubbing floors it is a very ordinary and common danger that tacks, pins or other foreign substances, which if knelt upon will produce injury, may have dropped upon the floor, especially in a public room such as a café. This was an ordinary risk of the employment and one which plaintiff assumed. If she had kept her knee upon the pad provided for her, the accident

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would not have happened, and it is not shown it was necessary to move from it. Furthermore, the X-ray photographs clearly show a foreign body in the knee, and the medical testimony indicates that in all probability the irritation set up by this piece of metal caused the injury. An inspection of the beer cap which is in evidence fails to disclose any sharp, broken or jagged edges; the doctor who was called within a few days found no evidence of a cut; and her own sister, who saw and describes the knee as it appeared on the day after the injury, does not mention any cut.

The plaintiff's injuries are, no doubt, permanent, and she deserves the sympathy that all right-minded people feel for such a misfortune to a hard-working woman. The accident occurred before the workmen's compensation act was in effect. Under the law as it then stood and as laid down in the instructions, the jury were not warranted in finding against the defendant. Nor is this court warranted in affirming the judgment, and thus taking \$2,500 of the money of defendant or his insurer for the benefit of plaintiff. Much has been said of the illegality of the conduct of defendant in selling beer after the legal hours, and, no doubt, this unlawful act had some influence with the jury. We can neither condone nor approve of this open violation of law; but, as we view the case, whether the beer was sold legally or illegally is not material.

The judgment of the district court is

REVERSED.

S. A. FOSTER LUMBER COMPANY, APPELLANT, v. H. E. GLATFELTER ET AL., APPELLEES.

FILED APRIL 1, 1916. No. 18838.

APPEAL from the district court for Merrick county:
GEORGE H. THOMAS, JUDGE. *Reversed with directions.*

James H. Woolley, for appellant.

Martin & Bockes, contra.

LETTON, J.

Plaintiff furnished material to defendant for the building of a house under an oral contract. Payment was made for most of the material as the work progressed, but, a dispute having arisen as to some of the items, defendant refused to pay the remainder due under the contract. A materialman's lien was filed by the plaintiff, to foreclose which this action is brought. The petition alleges the furnishing of material to the amount of \$1,512.60, and that there is a balance due of \$120.70, with interest.

The defense is that a certain grate included in the contract, of the value of \$22.50, 60 feet of oak flooring, of the value of \$6, and two door sidelights, of the value of \$16, were not furnished as provided by the agreement; that the lumber was not furnished promptly, thereby delaying the completion of the building for a month, to the damage of defendant in the reasonable rental value, which was \$25; and that defendant has been damaged by the loss of time of his employees in the sum of \$150. He asks judgment for the balance due after crediting plaintiff with \$120.70. The reply pleads that all the items were furnished, and denies any stipulation as to the time, and any damage by reason of delay.

From the testimony we are satisfied that, while plaintiff's agent may not have intended to furnish a grate, the defendant was justified in believing from the conversation that this was included in the estimate. As to the side-lights, the proof shows that when they arrived the glass in one of them was broken or cracked; that plaintiff offered to have this replaced, but defendant refused to receive the same because he wanted another style of light. We think he is justly chargeable with the cost of the side-lights, less \$3, the amount which it is shown it would probably cost to have the glass replaced.

Plaintiff has not sustained the burden of proof as to the delivery of more than 900 feet of oak flooring. Defendant is therefore entitled to a credit of \$6 on this item. It is shown that some delay was caused by defendant's desire to select fir finishing, instead of taking it as it came, and the consequent waiting for another car of fir to arrive, and we doubt whether the other delay was caused by plaintiff's fault. In any event, we are satisfied that the allowance of one month's rental value of the house covers all the damages defendant suffered from delay occasioned by the default of plaintiff. Defendant, therefore, should be credited with \$25 for delay, \$22.50 for grate, \$3 repairs on side-lights, and \$6 flooring shortage. After crediting the items mentioned on \$120.70 which defendant's answer admits is due plaintiff, the balance due is \$61.70, for which plaintiff is entitled to judgment as of April 23, 1914, the date of the original judgment in this case.

The judgment of the district court is reversed, and the cause remanded, with directions to enter judgment in favor of plaintiff for \$61.70, with interest from April 23, 1914, and costs of suit.

REVERSED.

SEDGWICK, J., not sitting.

LEWIS L. YOUNIE, APPELLANT, v. FRED SPECHT ET AL.,
APPELLEES.

FILED APRIL 1, 1916. No. 18850.

Appeal: RECORD: UNAUTHORIZED EXHIBITS. A judgment will not be reversed upon a stipulation of attorneys as to the evidence, not approved by the district judge and embodied in a bill of exceptions.

APPEAL from the district court for Morrill county:
RALPH W. HOBART, JUDGE. *Affirmed.*

G. J. Hunt, for appellant.

Williams & Williams, contra.

LETTON, J.

Action to restrain the execution and delivery of a sheriff's deed in proceedings taken under a judgment alleged by plaintiff to be void. The petition alleges that the judgment is wholly void on account of jurisdictional defects in the constructive service, and that the deed, if executed, will cast a cloud upon the title of plaintiff. The court found that the allegations of the petition were not supported by the evidence and for the defendant generally. Plaintiff appeals.

A transcript of the judgment was filed in this court in due time. Attached to it are filed two papers, one purporting to be a copy of an affidavit for service by publication, the other a copy of an order for service by publication in the action on which the judgment was based. A stipulation is also attached, which states that the papers of which these are copies "were the only extraneous evidence of any kind offered or considered by the court," and "that attached to this stipulation are full, true and correct copies of said affidavit for service by publication and the order for service by publication hereinabove described, and by agreement they are to be considered by the supreme court in reviewing the ruling of the district court upon the pleadings in the case first entitled herein."

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Such a stipulation cannot be considered unless brought up by a bill of exceptions. *State Ins. Co. v. Buckstaff*, 47 Neb. 1. It is there said: "A stipulation of the attorneys in a cause is no more part of the record than a deposition or any other evidence which may have been improperly included in the transcript. Matters which are not properly part of the record cannot be made so by being improperly inserted in the transcript. A stipulation of facts or mode of proof cannot take the place of a bill of exceptions. *Credit Foncier of America v. Rogers*, 8 Neb. 34; *State v. Knapp*, 8 Neb. 436; *Herbison v. Taylor*, 29 Neb. 217; *McCarn v. Cooley*, 30 Neb. 552. This stipulation could have been brought into the record by a bill of exceptions; but, that not having been done, it is not properly before the court, and hence it cannot be considered." *Keeler v. Manwarren*, 61 Neb. 663.

We must follow the settled policy of the court. It would be manifestly unfair to the district courts to review their proceedings upon evidence which has never been brought into the record, nor examined and certified as a part of it by the district judge.

The pleadings are sufficient to sustain the judgment, and it is therefore

AFFIRMED.

FAWCETT and SEDGWICK, JJ., not sitting.

EMMA KAUFMANN, APPELLANT, v. THOMAS E. PARMELE,
APPELLEE.

FILED APRIL 1, 1916. No. 18839.

1. **Conversion: GIFTS: PROOF.** In an action for conversion, proof of facts showing that the owner of bonds deposited with defendant for safe-keeping delivered the receipt therefor to plaintiff with the intention of making a gift thereof may establish plaintiff's title thereto, though the receipt was transferred without indorsement or assignment.

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2. ———: BONDS: VALUE: PRESUMPTION. In an action for the value of bonds converted by defendant, the presumption is that they were worth their face value, and the burden of proof is on defendant to show the contrary.
3. ———: ———: MEASURE OF DAMAGES. In an action by a pledgor against a stranger to the pledge for conversion of the pledged property, the measure of damages is the value of such property, less any sums paid by defendant to the pledgee.

APPEAL from the district court for Cass county: JAMES T. BEGLEY, JUDGE. *Reversed.*

D. O. Dwyer, for appellant.

C. A. Rawls and *W. A. Robertson*, *contra*.

ROSE, J.

In this action defendant is called to account for conversion of stock, in the sum of \$5,000, and bonds, in the sum of \$10,000, issued by the Long Distance Telephone Company of Norfolk, Nebraska. When William Volk was owner of the stock and bonds in controversy defendant obtained possession of them under the following instrument, described in the record as "Plaintiff's Exhibit 1":

"T. E. Parmele, President. G. H. Wood, Cashier.

"Bank of Commerce. Capital \$10,000. Surplus \$5,000.

"Louisville, Nebraska, February 1, 1910.

"Received of William Volk, for safe-keeping, \$10,000 six per cent. gold coupon bonds; \$5,000 six per cent. preferred stock, Long Distance Telephone Company of Norfolk, Nebraska. It is agreed between Thomas E. Parmele and William Volk that these bonds and stock are to be held at the Bank of Commerce, at Louisville, Nebraska, for five years, and the income to be paid over to William Volk as paid. Thomas E. Parmele."

Thomas E. Parmele, trustee for the purposes thus disclosed, is defendant. He was president of the Bank of Commerce, and was an officer and a stockholder of the Long Distance Telephone Company. In the petition plaintiff pleaded ownership of the stock and bonds by gift from

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Volk, delivery to her of the receipt quoted, and conversion of the property by defendant. The latter, in his answer, denied the gift and the conversion, and pleaded that Volk withdrew the stock and bonds from the safe-keeping of defendant and pledged them to the Bank of Commerce as collateral security for money borrowed from it, and thus received more than the value of the property pledged. In a reply to the answer, the withdrawal of the stock and bonds from the safe-keeping of defendant and the indebtedness and the pledge of Volk were denied. The trial court found the issues in favor of defendant and dismissed the action. Plaintiff has appealed.

The first question presented is plaintiff's ownership of the stock and bonds. In attempting to justify the judgment below, defendant argues that plaintiff did not prove the gift pleaded by her. The position thus taken is untenable. Volk was the owner of the stock and bonds February 1, 1910, when he entrusted them to the safe-keeping of defendant. Volk was engaged to be married to plaintiff, and during the existence of that relation delivered to her the receipt for the stock and bonds January 7, 1911, saying that he gave them to her, that they were in the bank at Louisville, and that he had no relatives. She kept the receipt in her possession at all times after he delivered it to her. He died May 5, 1912. Their engagement had never been abrogated. These facts were proved by uncontradicted evidence admitted without objection. Defendant, nevertheless, insists that the transfer of the receipt, undorsed, without actual delivery of the stock and bonds, is insufficient to establish a gift. No heir, executor or administrator claims the property. The unincumbered ownership of Volk and his right of possession February 1, 1910, are not disputed. According to the receipt, Volk then parted with possession. Thereafter the property was in the hands of defendant as trustee. Volk's ownership and title were not affected by the change in possession. He had a right to donate the stock and bonds to plaintiff. The receipt was a symbol of ownership. It was written

evidence of defendant's obligation to keep the property for Volk and to return it to him or to his assign. It was all Volk had in his possession to deliver when he made his donation. Under these circumstances delivery of the receipt to plaintiff with the intention of making her a gift amounted at least to an equitable transfer of the property to her. The transaction was valid between the parties to it. By it plaintiff acquired the rights of Volk, and with those rights defendant is not in a position to interfere. Plaintiff's ownership by gift is therefore established by uncontradicted evidence.

What became of the stock and bonds entrusted to defendant and subsequently donated to plaintiff? Volk had accepted them in part payment for a quarter section of land purchased from him by defendant. They had been issued by the Long Distance Telephone Company. Defendant was a stockholder and an officer of that corporation. Its bonds had been secured by a mortgage on its property. In a suit in the district court for Madison county, to foreclose the mortgage, the bonds donated to plaintiff were turned over to the clerk of that court. They had been taken from the Bank of Commerce. In thus taking and using the bonds defendant justifies himself in the language of his brief as follows:

"This he had a perfect right to do, as it is shown by the plaintiff's exhibit 1 that he was president of the bank, and his testimony is that the proceeds realized therefrom on the sale of foreclosure was less than the amount he had loaned to Volk."

Defendant bought the property of the Long Distance Telephone Company at foreclosure sale for \$20,010, and sold it a few days later, July 1, 1912, for \$50,000. Some of the bondholders shared with defendant in the proceeds of the resale, but there is no proof that plaintiff participated therein, or that any part of Volk's alleged indebtedness to the Bank of Commerce was ever paid.

The acts and conduct outlined amounted to a conversion, unless defendant pleaded and proved a justification. In

his answer he alleged in general terms that Volk withdrew his bonds from the safekeeping of defendant and pledged them to the Bank of Commerce as collateral security for money borrowed from it, and thus received more than the value of the property pledged. The testimony of defendant is that the bank's loans to Volk amounted to \$4,689.20. The testimony of the cashier is of a similar nature. There is no proof of a specific loan, of the execution of a note, or of an unpaid debt. Amounts and dates of loans were not stated. There is no documentary evidence of any debt or loan. No book entry or other record of the bank was offered. No excuse for such a method of attempting to establish a defense was suggested. An indebtedness essential to the pledge on which defendant relies is not shown by competent evidence. A trustee, bailee, pledgee or meddler cannot be permitted to escape liability in that manner.

The defense fails for other reasons. Defendant did not prove his allegation that Volk owed the bank more than the value of the property pledged. According to incompetent testimony, the bank's loans to Volk only amounted to \$4,689.20, if unpaid. Presumably the converted bonds were worth their face value. The burden of proof was on defendant to show that their actual value was less than their face value. *Powell v. Ong*, 92 Ill. App. 95; *Clark v. Cullen*, 44 S. W. (Tenn.) 204. There is no competent evidence sufficient to overcome the presumption that the actual value of the converted bonds was the same as their face value of \$10,000. On this branch of the defense, therefore, there is no justification for the dismissal of plaintiff's suit.

It may be fairly inferred from the testimony, from the admissions of defendant and from his attitude toward plaintiff, that he took the bonds from the Bank of Commerce and left them with the clerk of the district court for Madison county, where a suit to foreclose the mortgage securing them was pending. Defendant was sued as an individual. The bonds were not pledged to him. There is no intimation that Volk was indebted to defendant.

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The latter did not prove that he paid any part of Volk's alleged indebtedness to the Bank of Commerce. Title or right of possession is not traced from the pledgee to defendant. Defendant's right to the stock and bonds was neither pleaded nor proved. On the record presented defendant was a stranger to the pledge. The law is that, in an action by a pledgor against a stranger to the pledge for conversion of the pledged property, the measure of damages is the value of such property, less any sums paid by defendant to the pledgee. *Craig v. McHenry*, 35 Pa. St. 120; Jones, Collateral Securities (3d ed.) sec. 434.

For the reasons stated, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

OLIVER C. DOVEY, APPELLEE, v. GEORGE E. DOVEY ET AL.,
APPELLANTS.

FILED APRIL 1, 1916. No. 19209.

1. Judgment: RES JUDICATA. *Dovey v. Dovey*, 95 Neb. 624, examined, and held *res judicata* as to the facts alleged in paragraphs 1 to 5, inclusive, of the answer of defendants.
2. Defense: SUBMISSION. The defense interposed by paragraph 6 of the answer of defendants, referred to in the opinion, held to have been properly submitted to the jury and the verdict returned thereon amply sustained by the evidence.

APPEAL from the district court for Cass county: JAMES T. BEGLEY, JUDGE. *Affirmed*.

John L. Webster and *A. L. Tidd*, for appellants.

John J. Sullivan, *Anan Raymond* and *Francis A. Brogan*, contra.

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FAWCETT, J.

From a judgment in favor of plaintiff in the district court for Cass county, upon the promissory notes which were involved in *Dovey v. Dovey*, 95 Neb. 624, defendants appeal. The cited case was a suit in equity in the district court for Douglas county, by the defendants in this action against the present plaintiff as defendant in that suit. For a statement of the facts relating to the execution and delivery of the notes, reference is made to the opinion in that case.

The petition is in the usual form. The first five paragraphs of the answer are devoted to allegations of facts which plaintiff contends were all within the issues tried and determined in *Dovey v. Dovey*, *supra*. The only new matter pleaded in those five paragraphs will be found in paragraph 2, where it is alleged that, subsequent to the trial of that case, Jane A. Dovey, widow of E. G. Dovey, deceased, and mother of the parties in that suit, died testate, and that her legatees are now seeking, in the probate court of Cass county, to recover a large sum claimed to represent an interest which she is alleged to have had in the firm of E. G. Dovey & Son, at the time the settlement was made between the parties in *Dovey v. Dovey*, *supra*. In this paragraph it is alleged that plaintiff represented to defendants that Jane A. Dovey had ratified and approved the settlement and would surrender to the business of the firm her interest therein, and that one-third thereof was included in the consideration for the notes. The trial court ruled that *Dovey v. Dovey*, *supra*, was *res judicata* as to all of the matters set up in the first five paragraphs of the answer, and declined to submit the same to the jury. In this we think the court did not err. The facts alleged in paragraphs 1, 3, 4 and 5 were all clearly within the issues and determined in that suit. We think the facts attempted to be relied upon in paragraph 2 were also fairly within those issues, except, of course, the facts alleged in reference to the execution of a will by Jane A. Dovey, and the action now being taken by her executors

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and legatees. As to those facts, we think the answer fails to state a defense. Conceding that plaintiff made the alleged statements to the defendants in relation to the attitude of Jane A. Dovey toward the settlement then being made, there is nothing in the statement of the allegations of paragraph 2 of the answer, set out in defendants' brief, which shows that defendants relied upon the statements made by plaintiff, or that they were not as fully advised as to the interest of Jane A. Dovey in the firm and her attitude toward the settlement as plaintiff himself. Moreover, it clearly appears that, after the settlement in *Dovey v. Dovey*, and the retirement of plaintiff from the firm, the business continued under the management of defendants, and large sums of money were from time to time paid by them to Jane A. Dovey. In fact, the transactions subsequently had between defendants and their mother clearly indicate a full and complete understanding between them as to the rights or interest of the mother in the firm business.

The substance of paragraph 6 is that at the time the notes in suit were signed a mortgage securing the same was given upon an undivided two-thirds interest in 640 acres of land in Cass county, that plaintiff then agreed to look solely and entirely to the mortgage security for the payment of the notes, and is therefore without right to sue upon them at law. This defense was submitted to the jury and a verdict returned in favor of plaintiff. We deem it unnecessary to spend time upon this assignment. As we view the record, this issue was fairly submitted upon evidence amply sufficient to sustain the verdict.

Another contention is made in the brief of defendants that, at the time of the agreement in *Dovey v. Dovey*, there was an agreement among the three brothers, who composed the firm of E. G. Dovey & Son, that each should pay to his mother \$400 a year for her support, and that plaintiff failed to keep and perform that agreement by failing to pay such sums or any part thereof. This contention has no place in this action. There is nothing in

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the allegations of defendants' answer showing that by reason of plaintiff's failure to make such payments defendants suffered any loss, or were called upon to pay to Mrs. Dovey out of their private funds any sum whatever in excess of the \$400 a year each, which, under their own allegations, they were required to pay. It is clear, therefore, that, if plaintiff made any such agreement and failed to keep it, the only person who could complain of such failure was Mrs. Dovey herself.

The judgment entered being the only one which could properly be entered on the record before us, the other points presented will not be discussed.

AFFIRMED.

LETTON and HAMER, JJ., not sitting.

JAMES A. ANDERSON, APPELLEE, v. ESTATE OF ROBERT M. AKINS, APPELLANT .

FILED APRIL 1, 1916. No. 18595.

1. **Witnesses: COMPETENCY.** A witness who has a direct legal interest in the result of the litigation is not incompetent under section 335 of the Code, if such interest is not adverse to the representative of the deceased.
2. ———: ———. One who is jointly interested with the plaintiff in a claim being prosecuted against the estate of a deceased person is disqualified as a witness for such claimant. But the fact that both claims are for services rendered to the deceased will not disqualify them as witnesses for each other where they are upon separate and distinct transactions.
3. **Contracts: ACTION: PLEADING AND PROOF.** The allegation that services were rendered by plaintiff at the request of the deceased, "who promised and agreed to pay plaintiff for the same," will admit evidence of either an express or implied promise to pay for the services.

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4. ———: ———: ———. Such allegation is supported by proof that the deceased promised to convey or devise certain property in payment for services rendered, but refused or neglected to perform such agreement.
5. **Evidence: ACTION FOR WORK AND LABOR: MEASURE OF RECOVERY.** In such case, if there is no express contract as to the value of the services to be rendered, the measure of the recovery is the actual value of the services. A witness may testify to the value of a part of such services with which he is familiar.

APPEAL from the district court for Johnson county:
JOHN B. RAPER, JUDGE. *Affirmed.*

J. S. McCarty, H. A. Lambert and Hugh LaMaster, for appellant.

S. P. Davidson and Jay C. Moore, contra.

SEDGWICK, J.

The plaintiff filed a claim in the county court of Johnson county against the estate of his uncle, Robert M. Akins, deceased. The estate appealed to the district court for that county, and upon trial by jury in that court the plaintiff secured a judgment against the estate, and the defendant has appealed.

The defendant contends that the evidence is not sufficient to support the verdict and judgment, and complains of the rulings of the court in admitting and excluding evidence, and in an instruction to the jury. The plaintiff, with his mother, resided with the deceased from the infancy of plaintiff. They were both supported as members of the family. When the plaintiff became of age he proposed to seek employment for himself. At the request of the deceased he remained and continued with the deceased for about 15 years. During that time he worked on the farm of the deceased and assisted in every way in the accumulation of the property which was held by the deceased at the time of his death.

The plaintiff's mother testified in his behalf, and the defendant objected that she was incompetent as a witness under section 7894, Rev. St. 1913. This witness, as one

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of the heirs of the deceased, had a direct legal interest in the result of the litigation, but that interest was not adverse to the representatives of the deceased, and therefore did not disqualify her as a witness. *Hageman v. Estate of Powell*, 76 Neb. 514.

The defendant sought to disqualify this witness by cross-examination. She was asked whether she herself did not have a similar claim against the estate of the deceased for services rendered by her, and whether she had an understanding with this plaintiff that they should mutually assist each other in establishing their claims, and other similar questions, which were excluded by the court. The defendant now insists that this evidence would have established that the witness had a claim against the "estate arising out of the same facts and circumstances," and that this would disqualify. If the witness was jointly interested with the plaintiff in the claim that was being prosecuted, or if the two claims were so dependent upon the same facts as to amount to a joint interest in both, the objection to her testimony might be substantial, but the offer of testimony and the foundation laid therefor are far short of intimating such a condition, and we cannot say that the court erred in excluding these offers.

The petition, after alleging the services rendered by the plaintiff, contained the allegation that "said services were performed at the request of said Robert M. Akins, who promised and agreed to pay plaintiff for the same." There was no motion to make the petition more definite and certain in this respect, and the allegation was sufficient to admit evidence of either an express or an implied agreement to pay for the services. The objection that it was necessary under this allegation to prove an express contract fixing the price to be paid is without merit, and this is a complete answer to the objection to instruction No. 17. That instruction told the jury that, if the deceased agreed to leave his property to the plaintiff in consideration of the plaintiff's services, and that the plaintiff

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performed the services accordingly, and the deceased neglected to convey or devise the property to the plaintiff, then the plaintiff could recover the value of the services. This instruction was justified by the evidence in the case.

Some of the witnesses testified that they saw the plaintiff working for the deceased, and that the class of work was of a certain value. The defendant objects that the witnesses did not show themselves competent, and that these witnesses did not testify that the services were of equal value during the whole time of their performance. It was, of course, competent to prove by different witnesses that certain services were rendered and the value of such services. We have not found any prejudicial error in these rulings of the trial court. The evidence in regard to the value of the services is not so conclusive as to remove all possible doubt, but, upon the whole, we cannot say that the verdict of the jury is so clearly unsupported as to require a reversal.

The judgment of the district court is

AFFIRMED.

LETTON, J., not sitting.

OSCAR JOHNSON, APPELLEE, V. AMERICAN SMELTING & REFINING COMPANY; MONTANA CONSOLIDATED GOLD MINING COMPANY, INTERVENER, APPELLANT.

FILED APRIL 1, 1916. No. 18591.

Bankruptcy: SALE BY TRUSTEE: RIGHT OF PROPERTY. Where an employee of a mining company was engaged by the general manager of such company to perform certain necessary services as a watchman, and also other labor, and performed the same, whereby said company became indebted to such employee, and said general manager in payment of said indebtedness delivered to such employee certain copper plates formerly in use by such company, but at that time abandoned and no longer in use and not attached as a fixture to any part of the machinery of such company, said employee may properly be considered to be the owner of said plates, and, having sent the same to a smelting company to be smelted, will be entitled to

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the proceeds thereof as against one who purchased the mining plant from the trustee in bankruptcy after the delivery of the plates to said employee; said plates not being in the inventory of said trustee at any time, or in his possession.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

George W. Plummer and Weaver & Giller, for appellant.

Baldrige, Keller & Keller, contra.

HAMER, J.

The plaintiff, Oscar Johnson, performed services as a watchman, and also other labor, for the Kimberly Mining Company, which was the owner of a mining plant in Montana. The mining plant became indebted to Johnson a little less than \$2,000. It was financially embarrassed, and the plaintiff, Johnson, demanded to be paid for his labor, and with the purpose of paying him in view the general manager of the mining company delivered certain copper plates to said Johnson, who shipped them to the American Smelting & Refining Company at Omaha, for the purpose of having them smelted. While the plates had been a part of the Kimberly company's plant, nevertheless at the time they were delivered to the plaintiff they were loose and were not attached as a fixture to the mining company's equipment. The plaintiff appears to have worked for the company from a year and a half to two years and until a trustee in bankruptcy took charge of the affairs of the company. There was a sale by the trustee in bankruptcy of the plant of the Kimberly Mining Company to the Montana Consolidated Gold Mining Company. At the time of this sale the plates were in the possession of the plaintiff, Johnson, and had been in his possession for some time prior thereto. An action was brought by the plaintiff against the American Smelting & Refining Company to recover the proceeds of the plates which had been smelted by that company. The Montana Consolidated Gold Mining Company intervened. It was agreed that the value of the copper

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plates was \$1,758.44. This amount of money was placed in the hands of the district court for Douglas county to await the disposition of the case as between the plaintiff and the intervener; the smelting company disclaiming any interest in the property. The plaintiff had the verdict and judgment against the intervener.

The intervener has appealed. It complains of certain instructions given by the court. The first instruction reads: "The question that is submitted to you is: Who was the owner of the plates that were shipped from the mines by Johnson, the plaintiff in this suit, to the smelting company at Omaha, before they were so shipped? The money in the hands of this court was derived from the smelting of the plates by the smelting company, and the smelting company disclaiming any interest in the matter in controversy, has turned the money into court, to await your conclusion of ownership in the matter. The smelting company is out of the case, and, Johnson and the intervening Montana Consolidated Gold Mining Company each claiming the ownership, the result is this trial. The contention of Johnson is that he performed certain services as watchman, and otherwise, for the Kimberly Mining Company, owner of the mining plant, until the time that the Kimberly company was judicially declared a bankrupt in the federal court of Montana; that during the time that he was such watchman, and performing such service, Ryan was the manager in control of the Kimberly property for the Kimberly company, and that Ryan, acting within his scope and powers of general manager, and with authority so to do, paid the plaintiff, Johnson, for his said services to the Kimberly company, by transferring to him title and possession of the plates in question, and that he (Johnson) became thereby the owner thereof, and as such owner made the shipment to the smelting company, and that he is therefore entitled to the money in the court's possession, the avails of the smelting of the plates. All of these contentions of Johnson are denied by the intervener, the Montana Consolidated Gold Mining Company. In its turn, the

intervener, the Montana Consolidated Gold Mining Company, alleges that it became the owner of the plates from the smelting of which the money in court was derived, by reason of having bought all of the property of the Kimberly company at the trustee's sale, and that by reason thereof, the plates being part of the property at such time so bought, it is entitled to the money that has been paid into court. The plaintiff, Johnson, denies that the plates in question were a part of the plant of the Kimberly company at the time of the trustee's sale, but claims that prior to the time of that sale the title thereof, that is, to the plates, had become vested in the plaintiff Johnson."

It is then said, in substance, that it being established that the plates in controversy were at one time a part of the Kimberly company's plant, and that but for Ryan's sale the plates would have become the property of the intervener, therefore it is incumbent upon the plaintiff to establish by a preponderance of the evidence that prior to the time of the decree in bankruptcy the plates were sold to the plaintiff, Johnson, by Ryan as the Kimberly company's manager, and were received by Johnson as a fair and reasonable compensation for his services. The jury were distinctly told that the burden of proof was upon the plaintiff to establish this fact by a preponderance of the evidence, and that if he failed to do so they should find for the intervener. We do not see any well-founded objection to this instruction.

By the third instruction given, the jury were told that the general manager had authority to keep watchmen and to pay them with the company's credit or money after a petition in bankruptcy had been filed against the company, if good, reasonable care should so require, and until the petition had been acted upon and a decree rendered adjudging the company to be a bankrupt. At the same time the court told the jury that there would be no right for the general manager to employ such watchman or to pay for his services with the fixtures of the plant such as were of general use and part of the plant's mechanism. He told the

jury that only such property as had been discarded from use could be used by agreement with the laborers in paying them their compensation. This instruction seems to be right.

In the fourth instruction the jury are told, among other things, that if they should find that during the interim between the filing of the petition and the court's decree the manager of the Kimberly company paid for the labor performed for that company with plates which were not the immediate fixtures of the plant, but which had been discarded and which had been delivered to the plaintiff, Johnson, then they should conclude that the title to the plates did not pass to the Montana Consolidated Gold Mining Company at the trustee's sale, but did pass to Johnson, who, being so paid, became the owner before the trustee's sale was held. This instruction seems to be without error.

The fifth instruction reads: "In considering whether or not Ryan, as manager of the Kimberly company, did in fact sell to Johnson the plates, as Johnson claims, you will consider all the evidence relating thereto, including the evidence bearing upon whether or not he performed the services, whether or not Johnson was paid in fact by Ryan, as he claims, by the sale to him of the plates, whether or not in good faith they were ever discarded as proper working plates for the plant, whether or not they were ever delivered to Johnson, and, from all the facts and circumstances shown in evidence, come to your best conclusion as to the matters submitted for your consideration." This instruction seems to be fair.

The first instruction given to the jury at the request of the appellee is, in substance, as follows: You are instructed that if you find from the evidence that in August, 1908, and prior to the bankruptcy of the Kimberly-Montana Gold Mining Company, said company was indebted to the plaintiff for services already rendered, and thereafter to be rendered, by him as watchman and custodian of its mining plant and properties at Jardine, Montana, and that H. M. Ryan was then the managing director of

that company and, as such, had charge of its properties and business at Jardine, Montana, and for the purpose of paying for such services turned over to the said plaintiff the said copper plates, the same not being a part of the then working plant, and from the proceeds of which the money now on deposit in this court was realized through the American Smelting & Refining Company, to whom said Johnson had shipped said plates to be smelted, then your verdict should be for the plaintiff in this case, and it is unnecessary as a matter of law, that the said Ryan should have made any formal bill of sale to said Johnson if he turned the plates over to the plaintiff.

The election of Mr. Ryan as managing director of the Kimberly company is shown by the record to have been unanimous.

J. C. McMyynn testified that he was the consulting engineer of the Kimberly company; that Oscar Johnson, the plaintiff, was the watchman of the property. On cross-examination he testified that Johnson was his general utility man. The evidence shows that Mr. Ryan had been accustomed to buying and selling property for the Kimberly company. "Q. Did Mr. Walsh, as trustee, take charge of these plates at any time? A. No, sir. * * * Q. The first time? State whether or not he recognized your claim as the owner of those plates? A. That is the understanding." There appears to be no denial of this.

M. J. Walsh, the trustee in bankruptcy, testified that he sold the property of the Kimberly company to the Montana Consolidated Gold Mining Company; that the copper plates in controversy in this case were not included in the inventory because, before he was appointed receiver, he was told that the plates did not belong to the company, and, after he was appointed, he was again told that the plates did not belong to the company, but belonged to Mr. Johnson.

Walsh's testimony shows that he was the trustee in bankruptcy of the Kimberly company from the 9th day of August, 1909, to the 26th day of May, 1910. There was

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introduced in evidence a letter written by Oscar Johnson, known as the "Dryfus letter." It is dated March 31, 1913, and states: "I have been employed here to look after the property since 1907. Some time during 1908 Mr. Ryan, as managing director, gave me authority to sell the copper plates, as they were no good for any further use. They were torn up and scrapped when the mill first shut down. I was put here with an understanding that I was to get \$90 a month. All I ever received was \$200."

In conclusion, it would seem that the evidence shows that the plaintiff was properly employed by the general manager of the company, and that the company became in debt to him, and that the plates were turned over in payment of the debt, and that the plaintiff is entitled to the avails of the plates which were shipped to the smelting company at Omaha. The plates do not appear in the inventory of the trustee in bankruptcy and were never in his possession, and there is a failure to show that the intervener, the Montana Consolidated Gold Mining Company, bought them from him.

The judgment of the district court is

AFFIRMED.

ROSE, J., dissents.

SEDGWICK, J., concurring.

The appellant states as the proposition of law relied upon for reversal that "all of the property owned by the bankrupt at the date of the filing of the petition passed to the trustee, and from the trustee to the purchaser at the sale." This is the only question discussed with any attempt at compliance with supreme court rule 12. The petition in bankruptcy was filed December 18, 1907. The adjudication of bankruptcy was June 18, 1909. If the date of the appointment of a receiver is stated in the briefs, it is lost in the mass of evidence stated, but not utilized by the parties under rule 12. April 20, 1910, the property of the bankrupt was ordered sold, and was ac-

cordingly sold by the trustee December 15, 1910. There is no doubt, under the many cases cited by appellant, that as between creditors, and as to the right to prefer creditors, and perhaps for other purposes, the filing of the petition in bankruptcy fixes "the date of cleavage." Even for a time before the petition is filed creditors are prevented from obtaining preferences. For 18 months after the petition in bankruptcy was filed the property remained in the hands and under the control of the alleged bankrupt before any further proceedings were had. It was cared for and protected by the alleged bankrupt; this plaintiff having been employed for that purpose. Neither the creditors nor the court objected to using the money or property for that purpose. There was no appointment of a receiver until after the services were rendered and paid for. It would seem, under the decisions of the federal courts, cited by the parties, that to employ and pay the plaintiff was the proper thing to do. However that may be, which is a question for the federal courts, the creditors and the court, by its receiver, are not now complaining. The appellant claims to have bought this property at the receiver's sale, but the property was not described or included in the inventories, and, with the consent of all parties interested, had been shipped to Omaha before appellant purchased at the sale, which seems to be a complete answer to this claim. The appellant could not buy this property at the receiver's sale under the circumstances. If one of the creditors had taken this property and sold it in Omaha, another creditor, or the receiver, might require an accounting for the property. If this plaintiff has made himself liable to the creditors or to the receiver for the proceeds of this property, that fact would not transfer the title and ownership of the property to a subsequent purchaser of the remaining property of the bankrupt. The appellant suggests in the brief that the plaintiff conspired with the manager of the bankrupt company to withdraw these plates from a machine of which they were really a part, and, for that reason, when appellant bought that machine it also

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bought these plates, which were then in Omaha, and so is entitled to the proceeds of the sale of the plates. But there is no citation or discussion in the brief, in connection with this suggestion, of any evidence which would support such a charge, even if that would give appellant any right to the proceeds of the sale of the plates. In any view of the case, so far as appears from the discussion in the brief, the judgment of the court is the only one that could be supported, and I concur in affirming it.

OXYGENATOR COMPANY, APPELLANT, v. CASSIUS C. JOHNSON,
APPELLEE.

FILED APRIL 1, 1916. No. 18642.

1. **Sales: IMPLIED WARRANTY.** Where a manufacturer or dealer contracts to supply an article which he manufactures, or in which he deals, there is in such case an implied warranty that the article will be reasonably fit for the purpose to which it is to be applied.
2. ———: **WARRANTY: BREACH: DAMAGES.** In an action for damages for a breach of warranty as to the quality of personal property, where there is no rescission of the contract, the measure of damages is the difference between the value of the property as it actually is and what it would have been worth had it been as represented at the time the warranty was made.
3. ———: **ACTION FOR PRICE: DEFENSE: EVIDENCE.** The defendant having pleaded that the property in question was worthless, and having submitted proof tending to establish the fact alleged, the verdict of the jury so finding will be sustained.

APPEAL from the district court for Gage county: LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

Kretsinger & Kretsinger, for appellant.

Hazlett & Jack and *Walter Vasey*, *contra*.

HAMER, J.

This is an appeal by the plaintiff from the judgment of the district court for Gage county. It is alleged in the petition that between November 1, 1909, and February 4, 1910, the plaintiff sold and delivered to the defendant certain goods, wares and merchandise of the value of \$1,499.60, on which amount the defendant paid the sum of \$743.20, leaving still due to the plaintiff the sum of \$756.40; that the said goods, wares and merchandise were sold under a written contract, a copy of which was set forth, and consisted of 292 oxygenators; that the plaintiff had performed all terms and conditions incumbent upon it to perform, and was entitled to recover against the said defendant.

The defendant answered, admitting that he ordered the oxygenators from the plaintiff, but he alleged that the machines were not perfect, as the plaintiff represented they would be; that they were not perfect because they were not hermetically sealed, and were, as a matter of fact, entirely worthless; that therefore the defendant was not indebted to the plaintiff. The defendant also set up a counterclaim containing three alleged causes of action against the plaintiff. In the first he alleged that he purchased 292 oxygenators from the plaintiff under the contract referred to; that they were to be perfect instruments, but in fact they were not hermetically sealed, and therefore were worthless; that he suffered damages by reason of said defective machines in the sum of \$2,850. There was a second cause of action, which need not be discussed because it was withdrawn from the consideration of the jury.

In the defendant's third cause of action he alleged that the plaintiff purposely shipped him defective and worthless instruments in order to create an apparent indebtedness to the plaintiff for said machines, and, using said apparent indebtedness as a pretext, that the plaintiff wilfully and maliciously canceled said contract on the 21st

of February, 1910, and refused to furnish any more machines; that by said means the plaintiff purposely and intentionally destroyed the defendant's business, which was worth at least \$3,000 a year, and that defendant was greatly damaged thereby.

To the defendant's answer and counterclaims the plaintiff filed a reply and an answer in the nature of a general denial. The cause was submitted to a jury, which returned a verdict on the 25th of October, 1913, for the sum of \$1,719.05 for the defendant, Johnson. The jury also made special findings: (1) That there was nothing due plaintiff from the defendant; (2) that there was due defendant from plaintiff on the defendant's first cause of action in his counterclaim the sum of \$1,219.05; (3) that there was due from plaintiff to defendant on defendant's third cause of action in his counterclaim the sum of \$500.

There was a motion for a new trial, and the court was of the opinion that there was not sufficient evidence to sustain defendant's third cause of action for any amount, and granted plaintiff a new trial thereon. The court also required the defendant to remit from the special verdict of \$1,219.05 the sum of \$601.65. Finally, the court made an order requiring the defendant to remit the sum of \$1,101.65 from the general verdict, or submit to a new trial, and, upon the remittitur being filed, overruled the motion for a new trial and rendered judgment for defendant in the sum of \$617.40.

It is not disputed that the plaintiff was to furnish the defendant with perfect machines. The oxygenators seem to have been worthless. The defendant testified that of 292 of these machines there were a few more than 100 that were not hermetically sealed. He and his assistant, Ira R. Gould, tested them. Gould's testimony corroborated Johnson's testimony. Johnson testified that if the instruments had been in perfect condition each one would have been worth \$35. He further testified that of these 292 instruments he sold about 50 for \$6.50 each, and the remainder at prices ranging from \$17.50 to \$25 each. Johnson testi-

fied that the machines were worthless and without any value, and utterly failed to meet the conditions of the guaranty.

Charles N. McMichael testified that he was at present treasurer and bookkeeper of the Oxypathy Company, and that the company had formerly been called the Oxygenator Company, and that he had then been the treasurer and bookkeeper of that company; that he had had correspondence with the defendant, Cassius C. Johnson, and that his company had shipped Johnson some goods, and that he owed the company a balance of \$756.40. He testified to various charges against Johnson, and credits, leaving the balance above stated. The contract between the defendant, Johnson, and the plaintiff shows the latter to be "the sole owner and proprietor and exclusive manufacturer of clinical instruments known as "Duplex Oxygenator" and "00 Duplex Oxygenator," and recites that said Cassius C. Johnson is desirous of having the exclusive right to vend and sell said machine in certain territories of the United States. The exclusive right is granted "to sell the Duplex Oxygenator and the 00 Duplex Oxygenator within the states of Washington, Oregon, California, Nevada, Arizona, Utah, Idaho, Montana, Wyoming, Colorado, New Mexico, South Dakota, Nebraska, Kansas, Iowa, Missouri, and the counties of El Paso, Reeves, Jeff Davis, Presidio, Brewster, Pecos, Ward, Loving, and Winkler, in the state of Texas." At least 584 machines were agreed to be purchased, for which the defendant was to pay \$5 each for the 00 Duplex Oxygenator, and \$4 for each Duplex Oxygenator not in the 00 class. It was also agreed that the plaintiff would furnish as many more machines in excess of 584 as could be supplied by the plaintiff, having due regard for "supplying other territories in which sales of said machine are made."

The evidence shows that a book is distributed along with each machine. Pictures of the machine are shown by the record, and also the picture of a winding path through a beautiful forest. The machine itself seems to be a cylinder

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containing metals and chemicals said to be of mysterious and wonderful power. The oxygenator itself is declared to never require "recharging." "As you receive it from us, so you use it forever, the simple, silent doctor, does its duty and sends in no bills." It is so written in the book.

It is evident from Johnson's testimony that, if the instruments were not hermetically sealed, then they were perfectly useless.

Where a manufacturer or dealer contracts to supply an article which he manufactures, or in which he deals, there is in such case an implied warranty that the article will be reasonably fit for the purpose to which it is to be applied. Newmark, Law of Sales, sec. 333; 1 Benjamin, Sales (6th ed.) sec. 657; *Omaha Coal, Coke & Lime Co. v. Fay*, 37 Neb. 68. In the latter case it is said in the syllabus: "Where one contracts to supply a commodity in which he deals, to be applied to a particular purpose of which he is aware, under such circumstances that the buyer necessarily trusts to the judgment of the vendor, there is an implied warranty that the commodity shall be reasonably fit for the purpose to which it is to be applied."

"In an action for damages for a breach of warranty or fraudulent representations as to the quality of personal property sold, where there is no rescission of the contract, the measure of damages is the difference between the value of the property as it actually was and what would have been its value had it been as represented at the time the representation or warranty was made." *Young v. Filley*, 19 Neb. 543. *McConnell v. Lewis*, 58 Neb. 188; *Sherrill v. Coad*, 92 Neb. 406.

In *Young v. Filley*, *supra*, it is said in the body of the opinion: "Where there is no allegation of a rescission of the contract, the measure of damages is the difference between the value of the corn as it really was at that time and what it would have been worth had it been as represented."

In *Sherrill v. Coad*, *supra*, it is said in the syllabus: "In an action by a vendee for damages for a breach of warranty or fraudulent representations by the vendor as to the

quality of personal property purchased, where there is no rescission of the contract, the measure of damages is the difference between the value of the property as it actually was and what would have been its value had it been as represented at the time the representation or warranty was made."

If the entire property is worthless, the entire value of such property as it was warranted is a measure of damages, and can be recovered. Burdick, Sales (3d ed.) sec. 352; 2 Mechem, Sales, sec. 1817.

If the property was worthless, the defendant was not obliged to return it. *Punteney-Mitchell Mfg. Co. v. Northwall Co.*, 66 Neb. 5.

In the syllabus of the above case it is said: "Where the vendor, in pursuance of a contract of sale, delivers goods which do not conform to the warranty, which the vendee for that reason returns, or duly offers to return, and the vendor fails to furnish goods conforming to the warranty, the vendee has a right of action for breach of contract, and in such action is entitled to recover such damages as may be reasonably supposed to have been in contemplation of the parties, when the contract was made, as the probable consequences of such breach."

If the verdict rendered gave the defendant more than he was entitled to under the pleadings, this could be cured by the remittitur.

The defendant having pleaded and submitted proof that the property in question was worthless, it was proper that the jury might so find, and the court may take judicial notice that the property had no value. *Punteney-Mitchell Mfg. Co. v. Northwall Co.*, 66 Neb. 5.

The chemicals and material in the cylinder of the oxygenator being the thing which made the instrument valuable, if it was valuable, and these being worthless because not hermetically sealed, it was proper for the jury to take the defendant's view that the instruments had no value.

As the defendant was not in default, he did not owe the plaintiff anything, and the plaintiff had no right to break

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the contract; but, if the court erred in its instruction to the jury concerning the third cause of action, it is to be kept in mind that the plaintiff also claims that, if the defendant was in default, then the contract terminated according to its own provisions. The remittitur was properly allowed. In view of the uncertain value of the property and the uncertainty of the profits in the sale of it, we are unable to say that the judgment of the district court as a whole is not right.

The judgment of the district court is

AFFIRMED.

LETTON, J., concurs in the conclusion.

FAWCETT and SEDGWICK, JJ., not sitting.

GRAND LODGE, DEGREE OF HONOR, ANCIENT ORDER OF
UNITED WORKMEN, APPELLANT; JOHN H. LANGDON,
INTERVENER, CROSS-APPELLANT, v. SARPY COUNTY, AP-
PELLEE.

FILED APRIL 1, 1916. No. 19517.

1. **Taxation: MORTGAGES OF REALTY: WHERE TAXED.** Under the mortgage tax law (Laws 1911, ch. 105), being sections 6349-6353, Rev. St. 1913, real estate mortgages are to be taxed only in the county where the land mortgaged is situated.
2. ———: ———: **INTEREST IN REAL ESTATE.** Under the tax law above referred to, a mortgage on real estate in this state, when recorded, becomes an interest in real estate for the purposes of assessment and taxation.
3. ———: **CLASSIFICATION OF PROPERTY: MORTGAGES.** The act makes a new legislative classification of property and permits the separate taxation of the mortgage interest apart from the equity of redemption held by the owner of the real estate.

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4. ———: EXEMPTIONS: CHARITABLE ASSOCIATION. A fraternal beneficiary association, the Degree of Honor, is not such a charitable association that its funds are exempt from taxation by the laws of the state of Nebraska.
5. ———: MUTUAL BENEFIT ASSOCIATION. The property of mutual benefit associations organized under the laws of this state is taxable the same as the property of individuals, corporations, and other domestic associations. *Royal Highlanders v. State*, 77 Neb. 18.
6. ———: ———: MORTGAGES. As the mortgage tax law has made mortgages an interest in real estate to be separately assessed and separately taxed when the mortgage is recorded, it is immaterial whether the money secured by the mortgage loan is from the mortuary fund or from the general fund.
7. ———: ———: ———. Where a beneficiary association, in this case the Degree of Honor, takes advantage of the recording act for the purpose of protecting its interest and procures its mortgage to be recorded, it ceases to be personal property to the extent that it is a part of a fund, and it becomes an interest in real estate taxable in the county where the real estate mortgaged is situate.
8. ———: EQUITY OF REDEMPTION. In such case the owner of real estate, being liable to pay the tax levied upon his equity, cannot complain so long as no greater burden is laid upon him than the payment of taxes on the excess of the value of the real estate above the mortgage interest.

APPEAL from the district court for Sarpy county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

Stewart & Stewart and A. E. Langdon, for appellants.

E. S. Nickerson, contra.

HAMER, J.

A real estate mortgage for \$6,000 made by John H. Langdon and his wife to Grand Lodge, Degree of Honor, of Ancient Order of United Workmen of the state of Nebraska, was assessed by the taxing authorities of Sarpy county, Nebraska, as an interest in the real estate therein described, and under the provisions of the mortgage tax law enacted in 1911 (Laws 1911, ch. 105), and they also assessed the remaining equity in the land to John H. Langdon, the owner. The board of equalization refused to

strike the tax assessed against this mortgage from the record, and the matter was taken upon the petitions of the appellant and of the intervener, John H. Langdon, to the district court for Sarpy county. Demurrers were filed to said petitions by the said appellants, the said Degree of Honor and said John H. Langdon, upon the ground that the said petitions did not state a cause of action or entitle the petitioners to the relief prayed for. These demurrers were sustained, and the petitioners appealed from the order sustaining them.

The questions presented are: (1) Should the Degree of Honor be relieved from the payment of taxes on the mortgage? (2) If the court should find that the Degree of Honor was entitled to offset outstanding indebtedness upon beneficiary certificates against this mortgage, should Langdon pay taxes on the entire assessed value of the land, or only upon his equity?

Part of section 6350, Rev. St. 1913, reads: "A mortgage on real estate in this state is hereby declared to be an interest in real estate for the purposes of assessment and taxation. The amount and value of any mortgage upon real estate in this state shall be assessed and taxed to the mortgagee or his assigns, and the taxes levied thereon shall be a lien on the mortgage interest; and the excess in value of the real estate above the mortgage or mortgages thereon shall be assessed and taxed to the mortgagor or owner of the premises and be a lien on the owner's interest. The mortgagee or his assigns may pay the tax levied on the interest of the owner and have a lien thereon secured by the mortgage to the extent of the amount so paid with lawful interest thereon. The mortgagor or owner may pay the tax levied on the mortgage interest, and the amount so paid shall be claimed and held to be a payment on the indebtedness secured by the mortgage, and it may offset against any interest due thereon."

Sections 6349-6353, Rev. St. 1913, relate to the taxation of land and the taxation of the mortgage interest therein.

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It is contended by the appellee that a mortgage on real estate in this state, when placed of record, is an interest in real estate for the purposes of assessment and taxation.

It is provided in section 6351 above referred to: "The assessor shall, at the time the property is assessed, assess the mortgage interest and the value of the real property above the mortgage interest separately." This is a new classification of property. It permits the separate taxation of the mortgage and the separate taxation of the equity of the owner of the real estate.

That part of section 6350, not heretofore quoted, reads: "In case of nonpayment of any tax levied upon the interest of the owner or mortgagee or assigns, the land upon which the tax is unpaid shall be sold at the time and in the manner provided by law for the sale of real estate for delinquent taxes; and the holder of either the interest of the mortgagor or mortgagee may redeem from such sale the interest sold; and the amount paid in redemption shall be treated and cause the same rights to accrue in favor of the party making the payment as if payment had been made before sale."

In *State v. Fleming*, 70 Neb. 523, 539, it is said: "All property in this state is, by the Constitution, required to be taxed by valuation so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property and franchise. It must be conceded that property, whether belonging to the citizen or nonresident, must be equitably valued for taxation. When dealing with the taxation of property the legislature cannot discriminate in favor of the resident against a nonresident. Each is to be treated alike, and each is to pay a tax in proportion to the value of his property." In the same case (p. 523), it is said that the question to be decided is not whether particular provisions of chapter 73, Laws 1903, are valid, but whether the act considered as a whole is a constitutional expression of the legislative will.

In *Royal Highlanders v. State*, 77 Neb. 18, it was said: "It is further urged that it was the intention of the legis-

lature in passing the present law to completely exempt fraternal beneficiary associations from taxation. * * * It seems to us, however, that excepting such associations from those special provisions constitutes no evidence of an intention not to tax them, but, on the other hand, it shows an intention to tax them the same as all persons, corporations and other domestic associations. If the legislature had intended to exempt them from taxation, it certainly would have expressed such intention and thus put the question beyond all doubt. So we are of the opinion that the property of mutual benefit associations organized under the laws of this state is taxable the same as the property of individuals, corporations and other domestic associations."

In *Lancaster County v. McDonald*, 73 Neb. 453, 458, it is said: "The administration of the laws governing taxation has developed the difficulties, if not the impracticability, of permitting the subtraction of debts and liabilities of the owner of real estate and tangible personal property from its value for taxation. * * * The conclusion is that the legislature intended that moneys loaned or invested shall be taxed without deductions on account of indebtedness, and the 'credits' that are to be taxed are the true credits."

If a mortgage is to be assessed as an interest in real estate, it is impracticable to consider it a part of a mortuary fund or of any other fund where there is a right of set-off. If it is to be taxed as an interest in real estate, then its classification is changed. It is not real estate, but undoubtedly the legislature has the authority to so characterize it, and when it has done so it is no part of any fund, and its character is determined by the limitations of the statute. The interest in the real estate belonging to the owner thereof is taxable in the county in which the real estate is situate, and as soon as the mortgage becomes an interest in real estate by virtue of the statute it is taxed in the same county. Under section 6350, above quoted, the land upon which the tax is unpaid shall be sold at the time and in

the manner provided by law for the sale of real estate for delinquent taxes, and the holder of the interest of the mortgagor or mortgagee may redeem from such sale the interest sold. This is a change of the law as it existed prior to July 1, 1911, and section 6353, Rev. St. 1913, provides that all mortgages on real estate recorded prior to July 1, 1911, shall be taxable as provided by law under that provision of law relating thereto prior to July 1, 1911. It is clear from the language of the act that it was the intention of the legislature that a mortgage should be assessed as "an interest in real estate."

It does not appear to be material whether the Degree of Honor is indebted on beneficiary certificates beyond the amount of its fidelity fund. If it insists on putting its property out at interest so that it may earn money, it must comply with the provisions of the law concerning the assessment and payment of taxes. If it owns a mortgage it must pay tax upon the mortgage as any other owner would be expected to do.

In *Critchfield v. Nance County*, 77 Neb. 807, it was said that money loaned and invested discriminated that kind of property from "credit."

In *Lancaster County v. McDonald*, *supra*, it was said in the third paragraph of the syllabus: "The word 'credits' as used in section 28, art. I, ch. 77, Comp. St. 1903, means *net credits*." In the fourth paragraph it was said: "The statute distinguishes between items of property to be scheduled for taxation. The other items named in the schedule are not to be considered as credits so as to allow indebtedness to be deducted therefrom. Notes and mortgages which represent moneys loaned or invested are not subject to such deduction." In that case it was held that section 28, art. I, ch. 77, Comp. St. 1903, concerning the specific listing of all moneys loaned and invested, must be complied with, although the taxpayer might be indebted beyond the amounts of such loans and investments. It is immaterial whether the Degree of Honor is indebted on beneficiary certificates beyond its fidelity fund, for it can offset one

against that class of property that truly may be termed included in credits. That is not property loaned out and earning money as an investment, and by the statute changing the classification is forbidden.

In the case of the *First Trust Co. v. Lancaster County*, 93 Neb. 792, this court upheld the act of 1911 providing that mortgages on real estate in this state should be considered as an interest in land for the purposes of taxation, and held that a mortgage is an interest in real estate and "such mortgages are assessed separately from the capital stock of the company, whether the tax is paid by the mortgagor or by the mortgagee."

The mortgage tax law of 1911 requires the assessor of the county where the land lies to assess the mortgage. "The assessor shall at the time the property (real estate) is assessed assess the mortgage interest and the value of the real property above the mortgage interest separately." Rev. St. 1913, sec. 6351.

The legislature had power under the Constitution to provide for taxing this class of property as it is done. Section 1, art. IX of the Constitution, says in part: "The legislature shall provide such revenue as may be needed by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, the value to be ascertained in such manner as the legislature shall direct."

Section 6313, Rev. St. 1913, provides: "Personal property shall be listed in the manner following: Every person * * * shall list all his moneys, credits, bonds, or stocks, shares of joint stock or other companies, * * * moneys loaned or invested, annuities, franchises, royalties and all other personal property."

A mortgage on land may be held to partake of the character of realty. It is clearly within the authority of the legislature to provide that the mortgage shall be taxed in the county where the land lies and without regard to the residence of the mortgagee. This was clearly done by the passage of the act of 1911. The situs of the personal prop-

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erty belonging to the Degree of Honor is in the county where the company has its head office; but, as the legislature is given authority to pass the act which it did, the law now provides that the "interest in real estate" held by the Degree of Honor is in Sarpy county where it is to be listed. The law provides that it is the recording of the evidence with the register of deeds or the county clerk that works the change in the nature of the mortgage from personal property to "an interest in real estate." The Degree of Honor recorded their mortgage. They did that which under the law must change the character of the mortgage from personal property to an interest in real estate. It will not do to have one sort of construction of this law for private individuals and corporations, and another construction for the beneficial society.

It does not appear that cross-appellant Langdon has any right to complain of anything. He has not been hurt in any way. He owns the equity. He could hardly expect to avoid payment of taxes on his interest in the equity.

The judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

**RACHEL HUPP, APPELLANT, V. UNION PACIFIC RAILROAD
COMPANY, APPELLEE.**

FILED APRIL 1, 1916. No. 18550.

Bankruptcy: LIENS: ASSIGNMENT OF WAGES. Where a debtor assigns his future wages, no lien is created thereon until such wages are actually earned. If the debtor is adjudged a bankrupt prior to the earning of the wages, the debt, if listed in bankruptcy, is extinguished, and no lien attaches by reason of said assignment to wages earned thereafter.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Affirmed.*

Carl E. Herring, for appellant.

Edson Rich, B. W. Scandrett and C. B. Matthai, contra.

PARRIOTT, C.

June 12, 1907, one Henry F. Meyers assigned his salary, not yet earned, as an employee of the defendant, to the plaintiff in the sum of \$68 to secure the payment of a promissory note. November 7, 1907, Meyers was declared a bankrupt. The indebtedness in question was listed in the bankrupt proceedings, and said Meyers was duly discharged in said bankrupt proceedings on the 24th day of February, 1908. On the 29th day of April, 1908, the plaintiff notified the defendant of said assignment, and on the 20th day of May, 1908, demanded payment thereof of the defendant. It is admitted by the defendant that, at the time of said demand, the defendant was indebted to the said Henry F. Meyers in the sum of \$68. Before the commencement of this action, the said Henry F. Meyers obtained a judgment against the defendant for the amount that was alleged to have been assigned to the plaintiff, and in said action the defendant answered, alleging that the money in question was claimed under the assignment to Rachel Hupp. Said judgment and costs were paid by defendant. At the conclusion of the introduction of evidence, both parties asked for an instructed verdict, whereupon the court entered judgment for the defendant.

The principal question presented herein is whether or not the debt, alleged to be due plaintiff, by reason of the assignment from Meyers, was discharged in the bankrupt proceedings. The wages in question were earned after the adjudication in bankruptcy of said Meyers. The employee had a legal right to assign his future wages, and the assignment created a lien upon the wages earned up to the time of the bankrupt proceeding, but the plaintiff seeks to

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enforce the lien against the wages earned after such proceeding.

Under the rule laid down by the weight of authority, the plaintiff's debt was discharged in bankruptcy. The assignment created no lien upon the wages of the employee until such wages were really earned, and, the debt having been discharged before the wages were earned, it follows that at the time of the commencement of this action the plaintiff had no right to recover against the defendant by reason of such assignment.

The above proposition is fully sustained by the decision in the following cases: *In re West*, 128 Fed. 205; *Leitch v. Northern P. R. Co.*, 95 Minn. 35; *In re Home Discount Co.*, 147 Fed. 538; *In re Lineberry*, 183 Fed. 338.

The judgment of the trial court should therefore be affirmed.

BY THE COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and this opinion is adopted by and made the opinion of the court.

AFFIRMED.

GEORGE MANGOLD ET AL., APPELLEES, V. AMERICAN INSURANCE COMPANY ET AL., APPELLEES; HOME INSURANCE COMPANY ET AL., APPELLANTS.

FILED APRIL 15, 1916. No. 18841.

Insurance: CONTRACT: CONSTRUCTION. In an action on a fire insurance policy, to which an "average clause" is attached, covering a lumber yard and its contents wherein there are a number of buildings and piles of stock, all within a common inclosure, and also covering the same class of property on a lot lying across a street and disconnected from the main yard, where no separate designation of the buildings or piles of stock in the main yard is made in the policy, the main yard with the property therein will be regarded

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as one of the "premises" named in the "average clause," and the property disconnected therefrom will be regarded as a separate "premises" within the terms of the contract.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Affirmed.*

Stout, Rose & Wells and William C. Ramsey, for appellants.

Flansburg & Flansburg, John D. Wear and J. J. O'Connor, contra.

MORRISSEY, C. J.

Plaintiffs were engaged in the lumber business at Bennington, Nebraska. Their main yard and sheds were located on lots 6, 7, 8 and 9 of the railroad right of way, while across Stark street, 80 feet to the east, lay lot 18, block 10, which was used in connection with the yard as a place for piling stock and material.

March 1, 1911, plaintiffs took a policy of insurance for \$3,000 in the Nebraska Lumbermen's Mutual Insurance Association; hereinafter called the "Nebraska company," covering their stock of lumber and building materials, and "their sheds, office, and warehouse buildings, and office furniture and fixtures." April 25, 1912, they took additional insurance in the sum of \$3,000 in the Retail Lumbermen's Insurance Association of Minnesota, hereinafter called the "Retail company," covering the same property. September 15, 1912, they took a policy for \$3,000 in the American Insurance Company of New Jersey, hereinafter called the "American company," on the same property, and on January 6, 1913, they took a policy for \$5,000 in the Home Insurance Company of New York, hereinafter called the "Home company," covering the same property.

January 7, 1913, while each of said policies was in force, a fire occurred. The office building and some other property were destroyed, but none of the loss occurred on lot 18, block 10. Plaintiffs notified the insurance companies

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and asked for an adjustment. The American company and the Home company sent a Mr. Garmire to represent them. The Retail company sent a Mr. Holmes. Mr. Garmire asked for authority to represent the Nebraska company. Peter Mangold, father of the plaintiffs, was a director in the Nebraska company and lived at Bennington. The record seems to show that he was requested to act for his company, and it is the contention of the appellants that he did so; but he testifies that he did not so act, and the Nebraska company denies that it was represented in the making of the adjustment that followed.

The adjusters and the insured agreed that the total loss was \$4,807.51, which they undertook to apportion and charge against the respective companies as follows: Nebraska company, \$1,601.83; American company, \$1,601.83; Retail company, \$601.44; and the Home company, \$1,002.41. Proofs of loss were prepared and signed on behalf of the Mangolds, directed to the respective companies for the amounts stated. The Retail and the Home companies immediately sent drafts for the amounts charged to them, but the American and Nebraska companies, not being satisfied with the apportionment of loss, refused to pay the amounts assessed against them. Without cashing the drafts which they had received, plaintiffs instituted this suit on the four policies, and returned the drafts.

The amount of loss is admitted by all of the companies, but they differ as to the amount that ought to be paid by each. The cause was tried to the court without a jury. Judgment was entered against the American company for \$1,051.24; the Nebraska company for \$1,051.24; the Retail company for \$1,014.39, and the Home company for \$1,690.64. It may be said that this judgment sustains the theory of the American company and the Nebraska company. The Retail company and the Home company have appealed.

An average clause was attached to the Home policy, stating: "It is understood and agreed that the amount

insured by this policy shall attach in each of the above-named premises, in that proportion of the amount hereby insured that the value of property covered by this policy, contained in each of said places, shall bear to the value of such property contained in all of above-named premises." A reciprocal or favored policy clause was attached to the Retail policy, providing: "If any policy in any other company, covering the described property, shall contain any conditions of average or coinsurance, this policy shall be subject to the conditions of average or coinsurance in like manner."

Appellees contend that the main yard which constituted a single inclosure was one "premises" or risk and the property disconnected therefrom and lying across the street on lot 18, block 10, constituted another "premises" or risk. When the adjusters undertook their work they divided the property located on lots 6, 7, 8 and 9 into different "premises," and with this as a basis they reached the conclusions which have been heretofore set out. Appellees denied the correctness of this theory, and insist that this yard or inclosure cannot be arbitrarily divided after the loss has occurred. The court took the view contended for by appellees, and after a careful examination of the record we are constrained to believe that this yard or inclosure is not susceptible of the arbitrary division which the adjusters attempted to make. There are several buildings on the property. They are not placed with any regard for lot lines, nor separately named or described in the policy, but the whole scheme and arrangement indicates that the yard was intended to constitute a single "premises," and the lot across the street was intended to, and did, constitute a single or separate "premises." Taking this view of the record, the judgment entered by the court was the only one that could be entered under the admissions and the evidence, unless the other points raised by appellants are controlling.

It is claimed by appellants that appellees participated in the adjustment and are estopped from questioning the

correctness of the apportionment between the companies, but this claim is not sustained by the record. No one has changed his position because of the adjustment, and the doctrine of estoppel cannot be applied. It is true that plaintiffs signed up proofs of loss calling for the amount from each company which appellants say was the proper amount for each to pay, but it is very clear that in doing this they were simply making a formal statement at the request of the representatives of the companies. They agreed on the amount which they were to receive, and it mattered not to them how it was divided among the four companies carrying the insurance. They acted as other men similarly situated would act. They left the matter of division for the companies. They asked only for that which was coming to them, and signed the proofs of loss without question, but without intention of waiving their rights under the policies.

It is also contended that the American company and the Nebraska company were bound by the acts of the adjusters in fixing the amounts, but we think it may be seriously questioned whether the Nebraska company had a representative there. Even if Mr. Mangold was authorized to act for the company, he was without authority to increase its liability under the policy. The American company was represented by Mr. Garmire, but the terms of his employment did not authorize him to alter the liability of the company. So far as the adjustment went, it amounted to a mere settlement or determination of the amount of the loss, and neither increased or decreased the liability which any company owed under its policy.

The whole controversy appears to have arisen over the mistaken right of these adjusters to make an arbitrary division of the yard. We can find nothing in the record that warrants the making of such division as was attempted, and the judgment of the district court is

AFFIRMED.

ROSE and SEDGWICK, JJ., not sitting.

IRA LEE, APPELLEE, v. PAUL T. BROWN ET AL., APPELLANTS.

FILED APRIL 15, 1916. No. 18749.

1. **Attachment: WRONGFUL ATTACHMENT: LIABILITY.** In the absence of proof of fraud or conspiracy, a justice of the peace is not liable to the owner of property taken and sold under his judgment in attachment proceedings as the property of another.
2. ———: ———: ———. The same rule obtains in favor of the attorney who commenced the proceedings in attachment, although the plaintiff himself may be liable.

APPEAL from the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Affirmed in part and reversed in part.*

Crites & Sons and F. S. Baird, for appellants.

Allen G. Fisher and William P. Rooney, contra.

BARNES, J.

This was an action brought by the plaintiff in the district court for Dawes county, in which he sought to recover the value of a team of horses, a set of harness and a wagon alleged to have been wrongfully taken by the defendants and sold under an order of attachment against one Lyman Lee in a suit wherein the defendant Gus Makres was plaintiff and Lyman Lee was the defendant.

The plaintiff in his petition alleged, in substance, that he was the owner of the property taken and sold as the property of Lyman Lee; that defendants had due notice of plaintiff's ownership of the property, and, with knowledge of that fact, Paul T. Brown, acting as a justice of the peace, wrongfully proceeded to issue the attachment process, enter judgment, and order the sale of said property; that defendant Makres, as plaintiff, and Frederick S. Baird, as his attorney, well knowing that Lyman Lee was not the owner of said property, proceeded to sell the same, and wrongfully applied the proceeds of the sale to

the plaintiff's claim and for certain alleged fees of the justice of the peace and the constable who conducted the sale, to plaintiff's damage in the sum of \$300, for which plaintiff prayed judgment.

The defendants Makres and Baird joined in an answer in which they alleged that Lyman Lee was indebted to Makres in the sum of \$65; that on the 27th day of March, 1913, they commenced an attachment suit before defendant Paul T. Brown, a justice of the peace for Dawes county, against the said Lyman Lee, and placed the papers in the hands of a special deputy constable for service; that the attachment was levied on the two horses, a set of double harness, and a spring wagon, as the property of the defendant Lyman Lee; that thereafter such proceedings were had that Makres obtained a judgment against the defendant, and the property was sold to satisfy such judgment. It was further alleged that Ira Lee filed a notice in writing with the justice of the peace claiming to own said attached property. It was also alleged that neither Lyman Lee nor Ira Lee had ever appealed from the judgment rendered in that case. It appears, however, that the plaintiff, Ira Lee, was not a party to the action, and the court never gave him a trial or a hearing of any kind on his claim of ownership.

The defendant Paul T. Brown, by his attorney, filed a separate answer; he having removed to Chicago. By his answer he alleged that he was the justice of the peace before whom the attachment suit of Gus Makres against Lyman Lee was commenced; that all of the proceedings were regular, and, so far as he was concerned, were conducted in good faith; that Ira Lee did not file an inventory asking that the attached property be set off to him; that no hearing on plaintiff's claim was ever had; that, as such justice, he acted in good faith and without malice and therefore prayed that he might go hence without day.

Plaintiff filed a general denial to each of said answers. The cause was tried to the jury, and a verdict was returned for the plaintiff for \$175. A motion for a new trial was

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overruled, and the court rendered judgment on the verdict for the sum last named, and costs of suit. The defendants have appealed.

The record shows, beyond question, that the plaintiff, Ira Lee, was the owner of the property which was attached in the suit commenced against Lyman Lee. It appears that the jury was properly instructed. Indeed, the instructions are not complained of.

As we read the record, there was no evidence of any misconduct on the part of the defendant Paul T. Brown, who was the justice before whom the action in favor of Makres against Lyman Lee in which the attachment was issued was pending, and in which the judgment against said Lee was rendered, and no evidence of any misconduct or wrongdoing on the part of the defendant Frederick S. Baird. Therefore the district court was not authorized in rendering any judgment against them or either of them. We are of opinion that the verdict and judgment against the defendant Makres were proper, and, the record containing no reversible error in his favor, should be affirmed.

The judgment of the district court as to defendant Makres is affirmed, and as to defendant Brown and attorney Baird is reversed and the cause dismissed.

JUDGMENT ACCORDINGLY.

CITY OF FALLS CITY, APPELLEE, v. RICHARDSON COUNTY,
APPELLANT.

FILED APRIL 15, 1916. No. 19482.

Highways: ROAD FUND: CLAIMS AGAINST COUNTIES. The rule announced in *City of Albion v. Boone County*, 94 Neb. 494, and cases cited therein, held to control the questions presented by the defendant's appeal and sustain the judgment in this case.

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APPEAL from the district court for Richardson county:
JOHN B. RAPEL, JUDGE. *Affirmed.*

Kelligar, Ferneau & Gagnon and James E. Leyda, for appellant.

C. F. Reavis and John Wiltse, contra.

BARNES, J.

Action in the district court for Richardson county brought by the city of Falls City to recover from the county one-half of the road taxes collected by the county treasurer from the taxpayers of the city, and not paid over to the city or its authorities. After the issues were settled, a trial was had to the court, without a jury, upon a stipulation of facts which is contained in the record. The trial resulted in a judgment for the plaintiff for the sum of \$4,241.88. The defendant has appealed, but the plaintiff failed to perfect a cross-appeal.

The stipulated facts are, in substance, as follows: Plaintiff is a city of the second class under the laws of this state, and defendant is one of the organized counties of the state of Nebraska. In the year 1886 defendant adopted what is known as the township organization form of government, which has been in force from that date to the present time. Ever since the adoption of that form of government, plaintiff has been a city of more than 1,000 inhabitants and has constituted a supervisor's district, known as Road District No. 6, of the defendant county. The stipulation contained the amounts of the several levies of road taxes for the years 1880 to 1886, inclusive, all of which are stipulated to have been levied and collected on the property within the limits of the city. One-half thereof, as collected, has been fully paid to the plaintiff so there was no controversy as to those amounts. The stipulation next contained a statement of the road taxes levied and collected on the property within the city limits for the years 1889 to 1907, inclusive. It also contained a separate

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statement of such taxes, designated as road and bridge fund taxes, levied and collected by the defendant on the property within the city limits for the years 1908 to 1912, inclusive. It contained a further statement of the several amounts which the county treasurer had paid to the plaintiff city from time to time up to, and including, the year 1913.

The court found in favor of the defendant on all claims for the years prior to 1907, to which finding the plaintiff excepted. There was a further finding for the plaintiff and against the defendant on all claims for the years 1908, 1909, 1910, 1911 and 1912, to which finding of the court the defendant excepted. The court also found that the defendant was entitled to a credit for the payment to plaintiff of the following amounts: \$500 and \$420.17 paid to the plaintiff in the year 1913, to which finding the plaintiff excepted. The court thereupon made a computation, and determined the amount due the plaintiff to be \$4,241.88, for which the judgment was rendered.

Without making a specific statement of the contentions of the parties, or considering the several amendments to the road laws of 1879, it may be said that our holdings in *Libby v. State*, 59 Neb. 264, *City of Chadron v. Dawes County*, 82 Neb. 614, *City of Crawford v. Darrow*, 87 Neb. 494, and *City of Albion v. Boone County*, 94 Neb. 494, clearly show that plaintiff was entitled to recover a judgment in this case.

It further appears from the stipulation that since the amendment of 1907 the county has paid, or appropriated, certain amounts of the road fund tax to the benefit of the plaintiff, to wit: \$500 on January 9, 1913, and in September, 1913, there was appropriated to the use of plaintiff \$420.17. These amounts plaintiff has received, and therefore the county should be credited on the amount claimed by plaintiff the sum of \$920.17 with interest thereon since the dates of those payments. This was the finding of the trial court.

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We are of opinion that the questions involved in this litigation were correctly determined by the district court. Therefore, the judgment is

AFFIRMED.

SEDGWICK, J., not sitting.

157-620

**MICHAEL JORDAN ET AL., APPELLANTS, v. ROBERT E. EVANS
ET AL., APPELLEES.**

FILED APRIL 15, 1916. No. 18584.

1. **Infants: SUMMONS: SERVICE.** Service of summons on an infant under the age of 14 years merely by leaving a copy at his usual place of residence, and without service upon mother, father, guardian, or the person having his care and custody, or with whom he lives if they can be found, is void and of no effect. Rev. St. 1913, sec. 7637.
2. **Attorney and Client: APPEARANCE: PRESUMPTION.** An attorney at law being an officer of the court, there is a strong presumption that his appearance in an action is authorized, and the burden of proof is upon one who asserts the contrary to establish the fact by clear, convincing and satisfactory evidence.
3. **Parties: INDISPENSABLE PARTIES.** Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy, but also have an interest of such a nature that a final decree cannot be made without affecting their interests, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.

APPEAL from the district court for Dakota county: GUY T. GRAVES, JUDGE. *Affirmed.*

R. C. Roper, for appellants.

R. E. Evans, J. J. McCarthy and Fred S. Berry, contra.

LETTON, J.

In 1889 Mary Jordan became the owner of 240 acres of land in Dakota county. She and her husband, John Jordan, lived upon and farmed the land. Debts were contracted which resulted in a number of judgments being rendered against both Mr. and Mrs. Jordan in favor of E. H. Monroe & Company and other creditors. On December 19, 1894, the Jordans, being old and incapacitated, made a disposition of their property among their children in such a manner as to secure for themselves a home for the remainder of their lives. They made and delivered to their sons, John Jordan, Jr., and Patrick Jordan, who had been farming the land as tenants, a warranty deed to the farm. In consideration for this conveyance a bond was executed by the sons in the sum of \$2,000 which bound them to pay existing mortgages on the farm to the amount of \$2,150 and interest, and also to pay \$200 annually to their parents and the survivor, as well as to carry out other provisions for the old people. As a further consideration, separate notes, amounting in all to \$3,300, were made by Patrick and John, each payable in six annual instalments to the seven other children, and secured by seven separate mortgages on the land. The notes to Michael are in evidence. There is testimony that the notes to the others were afterwards burned in a fire which destroyed the family residence. The deed and mortgages were placed on record on December 29, 1894. The grantees took possession at once. On November 18, 1895, a creditors' suit was begun in the district court for Dakota county by E. H. Monroe & Company against the grantees and mortgagees in these conveyances. The petition alleged the recovery of a judgment against Mr. and Mrs. Jordan, that the family settlement was in fraud of creditors, and prayed that the conveyances be set aside and the property sold to satisfy the judgment. At this time two of the children, Nellie Jordan and Michael Jordan, were minors under 14 years of age, and Winifred was a minor over 14 years old, all residing with their par-

ents. The record shows that an answer was filed by one Kamanski, an attorney at Bloomfield, where Thomas then lived, purporting to be signed, "Mary Jordan et al., by Thomas Jordan." Afterwards other creditors were permitted to intervene, the last petition being filed on February 11, 1897. A motion filed by Kamanski asking that the petitions in intervention be made more definite and certain was overruled on March 9, 1897. In May, 1897, Paul Pizey was appointed guardian *ad litem* for the minor defendants. Testimony was taken, the deed and mortgages were decreed to have been fraudulently made, and were set aside in favor of the attacking creditors. Several years afterwards a sale was had of 80 acres of land under this decree to one T. A. Berry, trustee, from whom by mesne conveyances defendant Lamp derives his title. The object of the present action is to set aside the decree in the creditors' suit as being secret, fraudulent and unauthorized, to declare the title to the land to be in Patrick and John Jordan, and to foreclose the mortgages described.

The service of summons upon Nellie and Michael was void, for the reason that no service was made upon the parents or guardian as the statute requires, and it may be conceded that the return was impeached as to service upon four of the other children who then resided in Knox county.

Plaintiffs' contention is that by reason of a conspiracy the decree was secretly rendered at a time when the case had been previously continued to a later term, and without notice to any of the plaintiffs; that at a later term the case was dismissed for want of prosecution, but the entry of this judgment on the trial docket was erroneously made in another case, and that Kamanski had no authority to appear for any other parties to the suit than Patrick Jordan and John Jordan, Jr. The record is voluminous and the facts are out of the ordinary. After a careful consideration of all the testimony (which must be analyzed and compared in all its parts in order to extract the truth, being

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full of contradictions and improbabilities) and considering the admissions and inconsistencies appearing in the testimony of the Jordans, the usual course of human conduct, the presumption as to the appearance by an attorney, an officer of the court, and a number of incidents occurring subsequent to the rendition of the decree, we feel satisfied that Kamanski was at least tacitly authorized to act in behalf of the defendants who were then *sui juris*. The question is not free from doubt, and yet, giving due weight to the presumptions that attend the record of judicial tribunals, we feel that this is the proper conclusion. We hold, therefore, that the decree of May 24, 1897, was valid and effectual in favor of the creditors as against all defendants except the two minors under 14 years of age who were not served as the statute requires. This is the same conclusion arrived at by the district court.

The plaintiffs charge that R. E. Evans, judge of the district court for Dakota county at the time the Monroe decree was rendered, "acting in collusion and conspiracy with the other defendants herein and other coconspirators heretofore named," unlawfully and without authority permitted the decree to be fraudulently entered after the case had been continued. It is also charged that the conspirators allowed the plaintiffs Patrick and John Jordan to remain in possession of the premises until December 23, 1905, when Judge Evans "and Fred S. Berry, his coconspirator," procured an order of sale to be issued and a pretended sale was made to one Thomas A. Berry, who fraudulently pretended to be acting as trustee for the creditors. A number of other charges of fraud and collusion are made against these gentlemen. It is clearly shown by the testimony that at a subsequent time Evans (who had retired from the bench) and Berry, who were then acting for the creditors, Mr. Jay having died in the interim, offered, after the dismissal of the proceedings in the case of Jordan v. Hanson, to release all claim to the land if the Jordans would pay the amount of the judgments and costs, but this was never

done. We are satisfied from a careful inspection of the record that there is no evidence to support the allegations of fraud, collusion, or conspiracy, and that these charges are entirely unwarranted. We know of no rule of morals or ethics which debars a former judge, years after he has left the bench, from becoming the purchaser of real estate, the title to which had passed to a former holder of the title by virtue of a sale under a decree rendered by the court when he was acting as judge. Nor is the mere fact that an attorney in such proceedings afterwards buys from the purchaser at judicial sale a ground for criticism of his conduct.

It is urged that the Monroe decree is void for the want of service on the minor heirs under 14 years of age, since they were indispensable parties to the action. Indispensable parties are those who not only have an interest in the subject matter of the controversy, but (1) an interest of such a nature that a final decree cannot be made without affecting their interests, or (2) leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. *Chadbourne's Exr's v. Coe*, 10 U. S. App. 78; and cases cited in 15 Ency. Pl. & Pr. 611, 614.

Tested by this definition, did these minor heirs (1) have an interest in the controversy of such a nature that a final decree could not be made without affecting their interests? We are unable to see how a decree setting aside the deed to Patrick and John and the mortgages to the other parties defendant in favor of creditors could anyway affect the interests of these minors. Not having been brought into court, the decree was an absolute nullity as to them, and, so far as they are concerned, the deed to Patrick and John and the mortgages given to these children are valid and effectual. They have had no day in court with respect to the issue of their validity. Furthermore, the purchaser at the sale under the decree became possessed by his purchase

of all the interest in the real estate of the other defendants who were served or appeared in the action.

Was the controversy in the Monroe case (2) left in such a condition that its final determination was "wholly inconsistent with equity and good conscience?" It is apparent that the omission of these defendants was not wholly inconsistent with equity and good conscience so far as the plaintiffs were concerned, and the presence or absence from the suit of these minors could not and did not affect the justice of the decree or the interests of the other defendants. If it had been known that the entire interests of all the children were not subject to the decree, the purchaser at the sale might not have been willing to pay so high a price for the land, but this could not and did not affect the merits of the case. It was for the plaintiff in that case to decide whether it would proceed to decree under such circumstances, and the absence of these parties could affect adversely the plaintiff alone. It is not infrequent in cases of mortgage foreclosure that some party having an interest in the premises is not brought into the suit. This does not affect the validity of the foreclosure, but merely leaves an outstanding interest which the purchaser at the sale does not acquire. The decree was final and effectual as to those before the court. These minor heirs, therefore, were not indispensable parties to the action, and the failure to bring them in by proper service does not affect the validity of the decree as to the other defendants.

It is urged that, because the decree set aside the deed and all of the several mortgages upon the entire 240 acres, it was indivisible. It is true this is its purport, but the decree was only effectual to do this in behalf of creditors alone. When the sale of the 80 acres satisfied the creditors' claims, the decree had served its purpose, could operate no farther, and the deed and mortgages were as valid and effectual as if no such action had ever been maintained or decree rendered.

The district court found that the Monroe decree was valid as to all defendants except the minors under 14 years of age. It foreclosed the mortgages held by them, and provided the 160-acre tract be sold first, and, if the amount realized be insufficient, then the 80 acres should be sold. Since defendant Lamp appears to have purchased without knowledge of the infirmity of the title to the 80-acre tract, and defendant Hemstreet who purchased the mortgage executed by Lamp was equally innocent, this seems to be a just and equitable decree.

We have reached the same conclusion as did the district court. Its judgment is

AFFIRMED.

GREAT WESTERN COMMISSION COMPANY, APPELLEE, v. GOTTLIEB W. SCHMEECKLE, APPELLANT.

FILED APRIL 15, 1916. No. 18863.

Mortgages: FORECLOSURE: BURDEN OF PROOF. In an action to foreclose a real estate mortgage, when the allegations of the petition are denied, the burden is on plaintiff to make *prima facie* proof that no action at law has been instituted for the recovery of the debt. *Jones v. Burtis*, 57 Neb. 604.

APPEAL from the district court for Frontier county:
ERNEST B. PERRY, JUDGE. *Reversed.*

J. L. White, for appellant.

J. A. Williams, *contra*.

LETTON, J.

This action was brought to foreclose a mortgage by Friedricke Schmeeckle and Gottlieb W. Schmeeckle on 160 acres of land. The mortgage was given to secure the payment of a promissory note for \$2,700, signed by Friedricke

Schmeeckle and Gottlieb W. Schmeeckle, and payable to plaintiff. The petition is in the usual form. An answer was filed by Gottlieb W. Schmeeckle to the effect that he was not sufficiently informed as to the alleged facts, and therefore he denies each allegation in the petition contained and demands proof. No service was had on Friedricke Schmeeckle. At the trial the original mortgage was received in evidence. The plaintiff then offered the original note in evidence "for the purpose of a comparison of the signatures with the mortgage." Defendant objected on the ground that no foundation was laid. The objection was overruled. The clerk of the district court was then called, and testified that there was no other action pending in that court in which the defendants were being sued by the plaintiff. The attorney for defendant testified that Friedricke Schmeeckle was dead. He also testified that at a former hearing he had stated that defendant was ready to pay the interest, and that if plaintiff "would extend the time one year we would pay 8 per cent. interest and surrender possession without any trouble. * * * And I subsequently stated that we did not deny that we owed the debt."

This concluded the testimony. A decree of foreclosure was then rendered which contains the following finding: "The court further finds that Friedricke Schmeeckle is dead, and that before such death she conveyed all her interest in said land to her husband, Gottlieb Schmeeckle." Errors of law occurring at the trial and that the judgment is not sustained by sufficient evidence are assigned. That portion of the decree which finds that Mrs. Schmeeckle had conveyed her interest to her husband before she died is unsupported by the pleadings or the evidence. The mortgage was properly received in evidence, since, being acknowledged, it proved itself. Rev. St. 1913, sec. 6210. Construing the language of the offer of the note technically, it was offered only for the purpose of comparison of the handwriting. It is apparent, however, that counsel meant that,

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the mortgage having been received, the signature of the note is to be established by a comparison with the handwriting on the mortgage. This matter is really immaterial since defendant's attorney admitted the debt in open court.

There was a failure of proof as to the fact that no other action had been brought for the recovery of the debt secured by the mortgage, except as to the court in which the action was pending. This allegation was denied in the answer. In this state of the pleadings, proof that no such action had been begun was essential. *Beebe v. Bahr*, 84 Neb. 191, and cases cited.

The heirs or representatives of Mrs. Schmeeckle were not parties to the suit. All interested parties should be brought in.

The judgment of the district court is

REVERSED.

JAMES MCCARTHY, APPELLEE, v. VILLAGE OF RAVENNA, APPELLANT.

FILED APRIL 15, 1916. No. 18565.

1. **Master and Servant: INJURY TO SERVANT: GROSS NEGLIGENCE.** The violation of the statute requiring the employer to guard shafting is gross negligence. Rev. St. 1913, sec. 3597.
2. **Negligence: COMPARATIVE NEGLIGENCE: DIRECTION OF VERDICT.** "Where the facts in evidence tend to show both negligence and contributory negligence, the duty to make the comparison required by the statute rests with the jury, unless the evidence as to negligence is legally insufficient, or contributory negligence is so clearly shown that it would be the duty of the trial court to set aside a verdict in favor of plaintiff. Ordinarily, wherever there is room for difference of opinion upon these questions, they must be submitted to the jury." *Disher v. Chicago, R. I. & P. R. Co.*, 93 Neb. 224. Rev. St. 1913, sec. 7892.

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3. **Appeal: INSTRUCTIONS: HARMLESS ERROR.** A judgment will not be reversed on appeal for the giving of an instruction not prejudicial to appellant.

APPEAL from the district court for Buffalo county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

W. D. Oldham and R. M. Thompson, for appellant.

Wilmer B. Comstock and N. P. McDonald, contra.

ROSE, J.

Plaintiff brought this action against the village of Ravenna, his employer, to recover damages in the sum of \$20,000 for personal injuries. While on a ladder, whitewashing a wall in the pumping station of the village waterworks, he was caught in the coupling of a revolving overhead shafting, whirled around it, stripped of clothing, thrown on a cement floor below, and permanently injured. Defendant is charged with negligence for failure to guard the shafting and to countersink or cover the set-screws or bolts in the coupling. In his petition plaintiff invoked the statute containing the following provisions:

"It shall be the duty of any person, company or corporation operating any factory, mill, workshop, mercantile or mechanical establishment, or other institution where machinery is used, to provide or construct such guards and protection as will protect all employees against injury from belting, shafting. * * * Every protruding set-screw in collars and couplings of shaftings or other revolving machinery shall be countersunk or covered with metal boxings." Rev. St. 1913, sec. 3597.

"For an injury to a person occasioned by any violation of this act, by the failure to comply with any of its provisions, a right of action shall accrue to the party injured, for any direct damage sustained thereby." Rev. St. 1913, sec. 3599.

Defendant denied negligence, and pleaded in detail the following defense as stated in the answer: "The injury the plaintiff received was occasioned solely by his own gross

negligence, while violating the positive orders given him by defendant's water commissioner, and by exposing himself to known dangers of which he had been fully warned." A trial of the issues resulted in a verdict in favor of plaintiff for \$10,000. The recovery, however, was reduced by remittitur to \$6,000. From a judgment for the latter sum, defendant has appealed.

It is first argued by defendant that the evidence is insufficient to sustain the judgment. There is proof tending to show the following facts: Plaintiff was employed by defendant to work in the pumping station, where a shafting 46 feet long, 18 inches from a wall, was suspended 10 feet above the floor. The water commissioner authorized plaintiff to do some whitewashing. Near the shafting his work could not be done properly from the floor with a long-handled brush. He was urged to hurry, though the machinery was in operation. To apply the whitewash by hand with the brush itself, a method approved by the water commissioner, it was necessary for plaintiff to ascend a ladder and to reach over the shafting. While performing his duty in the manner indicated, a revolving coupling caught his clothing, wound it on the shafting, whirling him around with it, denuded him, and threw him on the floor. The shaft itself was unprotected and unguarded. The set-screws or bolts in the coupling had not been countersunk or covered, but protruded three-fourths of an inch beyond the surface of the coupling. The position of plaintiff while applying the whitewash from the ladder was similar to that frequently assumed by him in oiling the shafting pursuant to directions of the water commissioner. That plaintiff was seriously injured is not now questioned. His employment by defendant is established. The jury obviously accepted as true plaintiff's account of his injury. While he is contradicted in several particulars, the evidence, in view of the statute cited, is sufficient to sustain a verdict in his favor.

The principal assignments of error challenge the instructions on the subject of negligence. Attention is thus directed to the proofs in support of the defense that plaintiff's injuries resulted from disobedience of orders. The water commissioner testified, in substance, that he had directed plaintiff to keep away from the machinery when in motion, to use a long-handled brush and to remain on the floor while applying whitewash. Referring to this feature of the defense, the trial court gave an instruction concluding as follows:

"If you further believe from the evidence that plaintiff in violation of said orders and warnings took a ladder and a short-handled brush and ascended on the ladder to a place in dangerous proximity to the shafting and gearing of defendant's machinery, while the same was in operation, and while so doing exposed himself to known dangers and in consequence was injured, and if you further believe from the evidence that such acts and conduct on the part of plaintiff made him guilty of more than slight negligence as compared to the negligence, if any, of the defendant, then plaintiff cannot recover, and your verdict must be for defendant."

It is argued that the jury should have been instructed to render a verdict in favor of defendant, if plaintiff was injured as a result of disobeying orders. The common law rule that the negligence of plaintiff, if contributing to the injury for which he seeks damages, defeats a recovery, has been changed by statute. The law now is:

"In all actions brought to recover damages for injuries to a person or to his property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attribu-

table to the plaintiff; and all questions of negligence and contributory negligence shall be for the jury." Rev. St. 1913, sec. 7892.

Construing a similar statute, it was recently held:

"Where the facts in evidence tend to show both negligence and contributory negligence, the duty to make the comparison rests with the jury, unless more than slight contributory negligence of the plaintiff, in comparison with that of defendant, is so clearly shown that it would be the duty of the trial court to set aside a verdict in favor of the plaintiff. Ordinarily, wherever there is room for a difference of opinion upon these questions, they must be submitted to the jury." *Disher v. Chicago, R. I. & P. R. Co.*, 93 Neb. 224.

If plaintiff testified truthfully, the case made by him may be summarized thus: He was injured through the failure of defendant to comply with the statute requiring it to guard the shafting and to countersink or cover the set-screws or bolts in the coupling. A compliance with the statute would have prevented the injury. When injured, plaintiff, in performing the duties of his employment pursuant to the directions of his employer, was at work near the unprotected machinery. He did not disobey orders. His testimony, if believed, would justify the jury in finding that the injury of which he complains was caused by defendant's failure to comply with the statute. Such a violation of the statute is gross negligence. Could the jury properly find that plaintiff was not guilty of more than slight negligence in comparison? The answer depends on their view of the evidence. Plaintiff testified that he had repeatedly ascended the ladder to oil the revolving shaft; that the water commissioner had directed him to do so; and that his position on the ladder, while using the whitewash brush at the time of the injury, was practically the same as that often occupied by him, while oiling the shafting pursuant to the orders of the water commissioner. If the jury believed this testimony, they could consistently and reason-

ably find that plaintiff, comparatively, was guilty of only slight negligence, though they also believed that earlier in the employment of plaintiff he had been warned to use a long-handled brush and to keep away from the machinery while in motion. If plaintiff testified truthfully, he was not negligent in ascending the ladder to oil the shafting while in motion. If he afterward went to the same place under similar circumstances to apply whitewash, was he guilty of more than slight negligence in comparison with the gross negligence of defendant in violating the statute requiring guards which would have prevented the injury? Under the evidence, when considered with the statute on the subject of comparative negligence, defendant was not entitled to a more favorable instruction than the one given. In this respect there is no prejudicial error in the charge of the trial court.

Complaint is also made because the trial court used the word "negligence," instead of the statutory term "gross negligence," in permitting the jury to make their comparison. Other parts of the charge contained the literal language of the statute. It seems clear that the jury, when the instructions are all considered, were not misled to the prejudice of defendant by the omission of the word "gross." Prejudicial error in other respects has not been found.

The judgment is assailed as excessive, but a substantial reason for reducing it has not been given.

AFFIRMED.

FAWCETT, J., dissents on the merits.

SEDGWICK J., dissenting.

The majority opinion quotes the instruction given by the trial court submitting the question whether the negligence of plaintiff was slight. The instruction tells the jury that if plaintiff violated the orders and warnings of his employer, and in doing so "exposed himself to known dangers," and that the "consequences" of disobeying orders and warnings when he knew the danger of so doing was the

very injury he complains of, they might find that such conduct was slight negligence. It seems to me that such conduct as is stated in this instruction amounts to recklessly and wilfully injuring himself. By this instruction the jury were permitted to find for the plaintiff, although satisfied from the conflicting evidence that the plaintiff had knowingly caused his own injury. For this peculiar holding, *Disher v. Chicago, R. I. & P. R. Co.*, 93 Neb. 224, is cited and quoted from, a case which arose before the statute we are now construing was enacted, and did not involve the questions here presented.

The majority opinion is to my mind a very incomplete and unsatisfactory discussion of the important questions presented in this case under the new statute which we are now called upon to construe.

HAMER, J., dissenting.

As I understand it, section 3597 contemplates the construction of guards to "protect all employees against injury from belting, shafting, gearing, elevators, drums, saws," etc. Section 3599 provides: "The fact that any employee, servant or other person shall continue to work during the time such owner has failed to comply with the provisions of this article shall not be considered as an assumption of the risk of such employment by such employee, servant or other person." The purpose of the provision concerning the construction of guards for the shafting is the protection of employees. There seems to be a dispute as to whether the plaintiff was employed, and concerning the capacity in which he was employed if there was in fact any employment. It is uncontroverted that the shafting, which it is claimed ought to have been protected by a guard, was about 9 or 10 feet above the floor of the building in which the injury occurred. If the plaintiff was acting within the line of his employment, if he had actually been employed, then it is important whether the shafting had been protected by the guard. If the plaintiff had not been employed to do the whitewashing, which he undertook to do, and which

it appears was a voluntary act upon his part, and he went up in close proximity to the shafting and so was caught by a revolving shaft and injured, the defendant is not liable because it never agreed to the conditions and purpose of the employment. If plaintiff was employed to guard the machinery and in doing so should go up in the neighborhood of the shafting, about 10 feet above the floor, for the purpose of oiling the machinery, there might be a liability if he was injured, but in this case, as I understand it, he was voluntarily attempting to whitewash the inside of the structure, and he went up to the machinery which was not accessible from the floor, and while about 10 feet from the floor he sustained the injury complained of.

There appears to be evidence tending to show that the plaintiff was guilty of disobedience of orders, and that he violated the instructions given him, and that he exposed himself to dangers that were not required in his employment. If that is true, he should not be allowed to recover. There does not appear to have been given such instructions as the case demands covering the employment of the plaintiff and the liability of the defendant. He was told to keep away from the shafting, but, nevertheless, he went up there to engage in whitewashing the building, which was no part of his duty. If he was outside of his employment in what he did and violated the instructions which had been given him, he was guilty of gross negligence, and should not be allowed to recover anything. If the common law has been modified by the statute, nevertheless it is not intended to take away from the owner the control of his property and the direction of the servant or employee. It would be an alarming condition which would turn the property of the owner and its control over to the employee or to one who assumes to act as an employee. A reasonable construction should be given to these acts for the safety of servants and employees, and a radical view not contemplated by the law-making power should not be interpolated into these acts by the decisions of the courts.

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The instruction given does not seem to be warranted by the facts, and it was a license to the jury to find for the plaintiff, whatever they may have thought the facts were.

GEORGE RUSHART, APPELLEE, v. HOMER CRIPPEN ET AL.,
APPELLANTS.

FILED APRIL 15, 1916. No. 18870.

1. **Statutes: AMENDMENT.** The legislature, by amending an existing section covering the entire subject to which it relates, may incidentally change or modify other statutes without violating the constitutional limitations in regard to amendments. Laws 1907, ch. 81; Const., art. III, sec. 11.
2. ———: **CONSTITUTIONALITY: LOCAL AND SPECIAL LAWS.** In a suit to test the constitutionality of a legislative act, the presumption that an exception to general provisions is justified by facts within the knowledge of the lawmakers can only be overthrown by pleading and proof to the contrary, unless an unreasonable or arbitrary classification appears on the face of the act or is disclosed by facts of which the court may take judicial notice.

APPEAL from the district court for Sarpy county: JAMES P. ENGLISH, JUDGE. *Affirmed.*

Smyth, Smith & Schall, for appellants.

W. P. Lynch, contra.

ROSE, J.

This is a suit to enjoin the village board of Fort Crook from issuing a saloon license to R. D. Wansel. The law relating to intoxicating liquors formerly authorized the issuance of such a license on statutory terms, but the legislation was changed in 1907 by an amendment containing, among other things, the following provisos: "Provided, that no license shall be granted by the authorities of any

village for the sale of any liquor within two and one-half miles of any United States military post; provided, this act shall not apply to military posts maintained exclusively as signal-corps posts." Laws 1907, ch. 81.

The village was within two and one-half miles of the Fort Crook military post, which is not maintained exclusively as a signal-corps post. The trial court overruled a demurrer to the petition, and, the defendants refusing to plead further, an injunction was granted. Defendants have appealed.

Without questioning the remedy by injunction, defendants argue that the provisos quoted violate the following constitutional provision: "No law shall be amended unless the new act contain the section or sections so amended and the section or sections so amended shall be repealed." Const., art. III, sec. 11.

According to the title, the sole purport of the act assailed is the amendment of section 25, ch. 50, Comp. St. 1905. The section cited was a part of the general statute on the subject of intoxicating liquors, and granted to cities and villages the power to license saloons and to regulate the sale of intoxicating liquors. It is insisted that the amendment goes beyond the statute to which it refers and amends that part of the village charter empowering the village board to license and regulate the sale of intoxicating liquors. Rev. St. 1913, sec. 5115. The amended section is general in its nature and covers the subject of legislation to which it relates. In amending such a provision the legislature may incidentally modify or change other statutes. The licensing power granted by the city charter to the village board is by the very terms of the grant subject to general laws. Rev. St. 1913, sec. 5115. Reasons for sustaining the amendment are stated in a former opinion. *Dinuzzo v. State*, 85 Neb. 351.

Defendants further contend that the amendatory act is class legislation, and that it violates that part of the constitution inhibiting the enactment of local and special

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laws: "The legislature shall not pass local or special laws in any of the following cases, that is to say: * * * In all other cases where a general law can be made applicable, no special law shall be enacted." Const., art. III, sec. 15.

It is argued that there is no basis for the classification prohibiting saloons within two and one-half miles of a military post and allowing them within the same distance of military posts maintained exclusively for signal corps. It will be presumed that the lawmakers based their exception on conditions of which they had knowledge. An unreasonable or arbitrary classification does not appear on the face of the act. Defendants did not offer any proof. The pleadings do not allege facts indicating that the amendment is local or special within the meaning of the Constitution. Facts of which the court will take notice do not warrant such a conclusion. In a suit to test the constitutionality of a legislative act, the presumption that an exception to general provisions is justified by facts within the knowledge of the lawmakers can only be overthrown by pleading and proof to the contrary, unless an unreasonable or arbitrary classification appears on the face of the act or is disclosed by facts of which the court may take judicial notice.

A substantial reason for holding the amendment invalid has not been given.

AFFIRMED.

HERWARD CROOK, APPELLEE, v. WILLIAM B. CHILVERS, APPELLANT.

FILED APRIL 15, 1916. No. 18287.

1. **Abstracts of Title:** DEED RECORDS: EXAMINATION: DUTY OF ABSTRACTERS. The provisions in section 5623, Rev. St. 1913, which require the register of deeds to keep general grantor and grantee

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indexes of deeds and mortgages, and the provisions in section 5629, which make it the duty of the register of deeds, on receiving any conveyance or instrument affecting realty, to cause such conveyance or instrument to be entered upon a numerical index immediately after filing the same, are intended as checks, one upon the others, to insure accuracy in ascertaining the state of the records as to titles to real estate, and an abstracter is not justified in relying solely upon any one to the exclusion of the others.

2. ———: DUTY OF ABSTRACTER: LIABILITY. Ordinary care and diligence on the part of an abstracter, in performing the work for which he has been employed, require him to avail himself of every facility at hand in order to furnish his client an accurate and complete abstract of the records. For a failure so to do he will be liable personally and upon his bond.
3. ———: ———: ———. Any person engaged in the business of compiling abstracts of title to real estate in this state, who furnishes an abstract to one by whom he is employed for that purpose, is chargeable with knowledge of the use to which such abstract will in all probability be devoted, and he thereby becomes liable under section 6277, Rev. St. 1913, for all damages sustained by reason of any defect in such abstract, not only to the party who employed him to make it, but also to all persons who may deal with such party in reliance upon the abstract so furnished.
4. ———: ———: LIMITED EMPLOYMENT: CERTIFICATE. When an abstracter relies upon the numerical index alone to refer him to all entries upon the records affecting the title to the property which he is examining, he does so at his peril, unless the one employing him agrees that in the making of such abstract he may rely upon said index alone for such information; and in such case his certificate to the abstract must clearly and unequivocally show his limited employment and investigation by reciting that such was the method pursued by him in making the abstract.

APPEAL from the district court for Pierce County: ANSON A. WELCH, JUDGE. *Affirmed.*

O. J. Frost, and M. H. Leamy, for appellant.

Fred H. Free, contra.

FAWCETT, J.

About April 1, 1910, plaintiff entered into a contract for the exchange of certain real estate which he owned in Rock county, with one Van Norman, for 80 acres of land which

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Van Norman owned in Pierce county. Each party was to furnish the other with an abstract of title to the land which he was to convey. When they met to complete the exchange, plaintiff presented to Van Norman a deed to the Rock county land, together with an abstract, to which was attached the certificate of an attorney certifying that it showed good title in plaintiff. Van Norman presented his deed to the Pierce county land, but, not having an abstract, he delivered the deed to plaintiff with the arrangement that plaintiff should hold all the papers until he (Van Norman) furnished his abstract. Van Norman testified: "I was to furnish a perfect abstract." Again he testified: "Well, we made the deal, and papers were to be left in the bank until I had the abstract completed and brought down to date, and I had an abstract completed from Mr. Chilvers (defendant), and the deeds to the Rock county land were held in the bank until I should produce the abstract for this land in Pierce county." This abstract was delivered by Van Norman, about a month later, to the bank at which the papers had been left. Plaintiff testified that he then examined the abstract, was satisfied with the title which it showed, and that he relied upon it in finally consummating the deal. It subsequently transpired that there was a prior mortgage for \$400 upon the land, which the abstract did not show. The mortgagee subsequently foreclosed the mortgage, and after the foreclosure suit had proceeded to decree plaintiff, in order to protect his grantee to whom he had sold the property with full covenants of warranty, paid off the mortgage. He thereupon instituted the present action against defendant, who was the maker of the abstract, to recover the amount which he had been compelled to pay to satisfy the mortgage referred to. At the conclusion of the trial the court directed a verdict in favor of the plaintiff, upon which judgment was entered, and defendant appeals.

The fourth assignment alleges error in directing a verdict for plaintiff. The points argued in the brief may all be considered under this assignment.

A record of the county clerk, who, at the time the \$400 mortgage was recorded, was the custodian of the records of deeds and mortgages, shows that when the mortgage had been recorded it was delivered to Mr. Chilvers, the defendant in this action, who receipted upon the record therefor. The execution of this receipt by defendant is admitted. It appears therefore that at the time the mortgage was recorded defendant had full knowledge of the fact, and he should not be permitted to subsequently deny such knowledge. The evidence shows that at the time the abstract was prepared by defendant the mortgage had been spread upon the records and had been duly entered in both the grantor and grantee general indexes, but it was not shown on the numerical index, and the important question which we are called upon to decide is: Is an abstracter liable for a failure to show in his abstract the existence of a mortgage in such a case, or, to state it another way, may he implicitly rely upon the numerical index and examine only such instruments as are shown thereon, or is he bound to furnish an accurate and complete abstract of the records? Section 5623, Rev. St. 1913, requires the register of deeds to keep a grantor and grantee index of deeds in his office, and gives the form of such indexes. Section 5624 provides that the entries in such index shall be doubled, one showing the names of the grantors arranged alphabetically, and the other those of the grantees in like order, and that, where there are two or more grantors having different surnames, there must be as many distinct entries among the grantors as there are names, and that they shall be alphabetically arranged in regard to each of such names, and that the same rule shall be applied in the case of several grantees. Section 5628 requires the register to keep a numerical index as nearly as practicable in the form set out. Section 5629 provides that it shall be the duty of the register of deeds, on receiving any conveyance or instrument affecting realty, including mechanics' liens, to cause

such conveyance, instrument or mechanics' lien to be entered upon the numerical index immediately after filing the same. The statute is just as imperative as to keeping the general indexes as it is in relation to the numerical index. We find nothing in the statute which would justify an abstracter in relying upon the latter any more than upon the former. The purpose of the statute unquestionably is to require the keeping of the general index and the numerical index in order to guard against such a blunder as was made in the case at bar. We think, therefore, it is clear that, even if an abstracter is not required to go through the record books themselves, for the purpose of determining the condition of the title to real estate, of which he is making an abstract (a point which we do not decide), he cannot shield himself from liability by relying upon one only of the indexes referred to. Ordinary care and diligence in performing the work for which he has been employed require him to avail himself of every facility at hand, in order to furnish his client that which he knows his client has employed him to furnish, viz., an accurate and complete abstract of the records. He certainly should not be permitted to escape liability when on the abstract he furnishes he certifies, as defendant did in this case, that the abstract "is a full and complete abstract of all instruments on record or on file in the office of the Register of Deeds of said county, that in any way affect the said lands; that the same are properly executed, and properly indexed; * * * and that I have compiled the within abstract from the records of said county, and not from the indexes." The abstract which defendant furnished was not such an abstract as this certificate certified it to be.

Section 6277, Rev. St. 1913, provides: "It shall be unlawful for any person * * * to engage in the business of compiling abstracts of title to real estate in the state of Nebraska, * * * without first filing in the office of the county judge, in the county in which any such business is conducted, a bond to the state of Ne-

braska in the penal sum of ten thousand dollars, executed by any surety company authorized to do business in this state as surety, or with not less than three sureties residents of the county to be approved by such county judge, conditioned for the payment by such abstracters of any and all damages that may accrue to any party or parties by reason of any error, deficiency or mistake in any abstract or certificate of title made and issued by such person."

Defendant had given the required bond, and at the time of making the abstract was engaged in his business as a bonded abstracter, under the provisions of the section quoted. The abstract which he furnished was incorrect in failing to show the mortgage above referred to. When he furnished Van Norman the abstract, he was bound to know the use to which the abstract would in all probability be applied. He thereby became liable for all damages which might be sustained by reason of any defect in his abstract, not only to the one who employed him to make it, but also to the parties who might deal with such party in reliance upon the abstract so furnished; and no custom on the part of defendant himself, or other abstracters, could be shown to relieve him from the obligations imposed upon him by the statute. We therefore hold that, when an abstracter relies upon the numerical index alone to refer him to all entries upon the records affecting the title to the property which he is examining, he does so at his peril, unless the one employing him agrees that in the making of such abstract he may rely upon said index alone for such information; and in such case his certificate to the abstract must clearly and unequivocally show that that was the method pursued by him in making the abstract, so as to advise all parties to whom it may be presented of his limited employment and investigation. He cannot in such a case certify that he compiled the abstract "from the records of said county, and not from the indexes," and then seek to destroy the

force of that certificate by testimony of a witness that that language means "that I have not simply taken the information on the numerical index and put that information into my abstract as my complete report, but that from the information there indexed I have gone to the records of the instruments and compiled my abstract from the record itself," as was attempted to be done in this case. The trial court did not err in refusing to receive such testimony. Such a construction by abstracters, if sustained, would render the keeping of general indexes by registers of deeds a mere waste of time and a needless expense.

It is argued that, inasmuch as the mortgage was not shown on the numerical index, it was not properly recorded; that, when plaintiff took his deed without actual knowledge of the existence of the mortgage, he took it as an innocent purchaser, and therefore had a perfect defense to the foreclosure suit; and, not having interposed that defense, he cannot now recover from the defendant. This means that, if a deed or mortgage is not entered on the numerical index, it is not properly recorded, and hence is void as against subsequent purchasers without notice, even though it be in fact spread upon the record and properly entered in the general indexes. This contention is clearly met in *Lincoln Building & Saving Ass'n v. Hass*, 10 Neb. 581, where we held: "A mistake of the county clerk in entering a description of mortgaged premises on the numerical index, the mortgage being in all other particulars properly recorded and indexed, will not vitiate the record as to subsequent purchasers."

If the contention of defendant in this case is sound, then one who files a deed or a mortgage for record is bound at his peril to stand by and see that the deed is properly recorded and indexed. This contention is met in *Deming v. Miles*, 35 Neb. 739, as follows: "Where a party files a deed properly executed and acknowledged for record with the proper officer, he is not bound to see that the officer performs his duty by actually recording it, nor

is he responsible to other parties for the officer's neglect of his duty. The proper filing of such deed for record operates as constructive notice to all subsequent purchasers and mortgagees, although the officer may fail to comply with the requirements of the statute with respect to the recording of the instrument."

"A purchaser of real estate who takes his deed to the office of the register of deeds and deposits it with him for record, and pays the fees for recording and entering the same on the numerical index, discharges thereby his duty of notice to the public; and if, through the fault alone of the register, the deed is lost or mislaid, and not entered of record or entered on the index, such failure will not work to the prejudice of the title of such purchaser, even in favor of a subsequent purchaser without actual notice." *Perkins v. Strong*, 22 Neb. 725.

That the wording of the certificate is important is shown in *Thomas v. Carson*, 46 Neb. 765, which is cited by defendant to the point that the liability of an abstractor is contractual, and there was no privity of contract between plaintiff and defendant. We do not understand the opinion sustains the point under which it is cited. It is, however, a strong authority against defendant's contention upon the effect to be given to the wording of the certificate of the abstractor. The abstractor was held not liable in that case. Let us see why. In his certificate he certified: "I have carefully examined the records and files of the county clerk's office, office of the clerk of the district court, and treasurer's office, all of the county of Adams and state of Nebraska, and that the foregoing abstract is true in all respects." He further certified that there were no deeds, mortgages (and numerous other kinds of instruments named), or any liens of mechanics or for taxes upon the premises described in the heading of the abstract or any part thereof "upon or in the records of either of the said three offices, to wit, county clerk's office, office of the clerk of the district court, and treasurer's office, all of the county of Adams, except as herein-

before set out." On the back of his abstract there was printed a blank certificate in the usual form, in which it was recited that the abstract "is a full and complete abstract of all conveyances upon record affecting the property therein described." Carson, the abstractor, did not fill out and sign that blank, but prepared a special certificate as above shown. The court in the opinion (p. 769) say: "Carson, for reasons not disclosed by the record, instead of using the blank above mentioned, which included all conveyances affecting said property, executed and attached to the abstract a certificate in the following form (setting out the special certificate from which we have above quoted)." The opinion shows that for more than a year prior to the time the abstract was prepared the county clerk had ceased to be the custodian of the public records, that the office of register of deeds was at that time in existence in Adams county, and that the register of deeds had by law been made the custodian of all records of deeds, mortgages, etc. Had the certificate attached to the abstract in the case at bar, or one like that printed upon the back of the abstract in *Thomas v. Carson*, been used instead of the special certificate, it is very clear that the abstractor would not have been released from liability.

We have carefully examined every case from this court cited by defendant, and not one of them would have justified the trial court, under the undisputed evidence before us, in entering any different judgment than the one that was entered.

AFFIRMED.

ROSE, J., dissents.

AMY L. WILSON, APPELLEE, v. OMAHA & COUNCIL BLUFFS
STREET RAILWAY COMPANY, APPELLANT.

FILED APRIL 15, 1916. No. 18588.

1. **Carriers: INJURY TO PASSENGER: NEGLIGENCE: SUFFICIENCY OF EVIDENCE.** The evidence examined, its substance set out in the opinion, and *held* sufficient to justify the submission to the jury of the charge of negligence on the part of the motorman in stopping the car in an unusually sudden and abrupt manner, and sufficient to sustain the verdict of the jury thereon.
2. **Instructions 6 and 7** requested by defendant examined, and *held* properly refused.
3. **Trial: INSTRUCTIONS: STATEMENT OF ISSUES: HARMLESS ERROR.** In an action for personal injuries, where the trial court intends to submit but one of several acts of negligence charged, it is improper practice to include in the statement of the issues to the jury a recital of the other allegations of negligence pleaded; but, where such statement is followed by an instruction which clearly and explicitly eliminates from the case everything but the allegation of negligence to be submitted, and limits the jury to a consideration of that charge alone, the improper recital in the statement of the issues will, ordinarily, be held to be error without prejudice.
4. **Appeal: REVIEW.** Where the giving or refusing of an instruction is not excepted to at the time, nor called to the attention of the trial court in the motion for a new trial, it cannot be assigned as error on appeal.
5. **Damages: SUFFICIENCY OF EVIDENCE.** The evidence examined and set out in the opinion *held* sufficient to sustain the amount found by the jury as the measure of plaintiff's damages.

APPEAL from the district court for Douglas county:
CHARLES LESLIE, JUDGE, *Affirmed*.

John L. Webster and W. J. Connell, for appellant.

W. W. Bulman and Sutton, McKenzie, Cox & Harris, contra.

FAWCETT, J.

From a judgment of the district court for Douglas county, awarding plaintiff damages for personal injuries, defendant appeals.

The facts, briefly stated, are: Plaintiff was a passenger upon defendant's electric street car. She desired to leave the car at Sixteenth street and Capitol avenue. When the car came to a stop at that point a number of passengers alighted. Plaintiff had left her seat and was walking toward the exit a little in the rear of the other passengers who were alighting. When she was within some three or four feet of the exit door, the conductor, who was standing upon the back platform facing the rear and collecting fares from passengers who were boarding the car, signaled the motorman to go ahead. The car at once started forward, whereupon plaintiff said to the conductor: "Let me off, please." The conductor evidently heard her request, and, turning about, saw that she desired to "get off." He thereupon gave the signal of one bell to stop the car. Plaintiff alleges that "the motorman in charge of said car caused the same to be brought to an unusually sudden, violent, instant and abrupt stop; that so abruptly and suddenly was the movement of said car stopped that the plaintiff was thrown to the floor of said car with great force and violence, receiving and sustaining the injuries complained of." The petition also charged negligence on the part of the conductor in starting the car before plaintiff had time to alight, but the trial court withdrew that issue from the jury, and submitted only the allegation of negligence on the part of the motorman.

Defendant presents and discusses five assignments of error which we will consider in their order.

1. It is argued that, instead of giving instruction No. 3, the court should have directed the jury to return a verdict for defendant, for the reason that the evidence was insufficient to sustain the charge of negligence submitted by that instruction. Instruction No. 3 reads as follows:

"There is no evidence in this case sufficient to justify or authorize you to find that the conductor of the car on which plaintiff was riding, at or prior to the happening of the accident to her, was guilty of doing or failing to do any act or thing that would constitute negligence on his part. The only actionable negligence alleged in the petition of plaintiff which you are to consider is the allegation that 'the motorman in charge of said car caused the same to be brought to an unusually sudden, violent, instant and abrupt stop; that so abruptly and suddenly was the movement of said car stopped that the plaintiff was thrown to the floor of said car with great force and violence, receiving and sustaining the injuries complained of.' You are further instructed that you would not have the right in this case to declare or determine that the defendant was guilty of negligence in any other respect."

The testimony of the witnesses as to the manner in which the car stopped is conflicting. The motorman and conductor and two or three gentlemen who were standing upon the rear platform all testified that there was nothing unusual in the manner in which the car came to a stop. The testimony of plaintiff tends strongly to show that the stopping was unusually sudden. She testified that it caused a "violent rocking sensation;" that it rocked first toward the south and then toward the north; that the rocking was a "violent motion throwing me forward and backward;" that it first threw her south and then north; that when she went back the last time it threw her down violently and suddenly; that she did not have time to reach any of the handrails; that she had braced herself with her feet, but did not know the car was going to stop that way; that she was thrown about four feet back from where she was standing. The plaintiff is not corroborated by the testimony of any witness, but it is argued by her counsel that the doctrine of *res ipsa loquitur* applies; that the manner in which she was thrown to the floor furnishes corroboration of her testimony. When we consider, in addition to this, that the motorman and con-

ductor were men accustomed to the lurching of cars, and that the other witnesses were men who were standing upon the rear platform, leaning against the side of the rear vestibule, the jury may well have believed that they were not as competent to testify as to the actual manner of the stopping as plaintiff. However that may be, they have found this important issue, which was properly submitted to them by the trial court, in favor of the plaintiff, and we cannot say that her testimony, when compared with the testimony of the witnesses against her, is so unreasonable as to warrant us in setting aside the verdict on the ground that the evidence is insufficient to show negligence on the part of the defendant. Numerous authorities from other states, notably Massachusetts, are cited by defendant, which, if followed by us, would, under the facts shown, relieve the defendant from the charge of negligence in stopping the car as was done. Those cases go to the extent of holding that it is not enough to show that there was a sudden jerk of the car, but it must affirmatively appear that the jerk was extraordinary or attributable to a defect in the track, an imperfection in the car or apparatus, or to a dangerous rate of speed, or to unskilful handling. This court has never gone so far as that. On the contrary, as stated in *Lincoln Street R. Co. v. McClellan*, 54 Neb. 672:

"It is settled by the decisions of this court that street railway companies are common carriers of passengers. (Citing cases). As such they are bound to exercise for the safety of their patrons more than ordinary care. They are required to exercise the utmost skill, diligence, and foresight consistent with the business in which they are engaged, and are liable for the slightest negligence. This is the liability imposed by the common law on all carriers of passengers for hire. (Citing cases). The law presumes that one injured while being transported by a common carrier was injured in consequence of the latter's negligence; and to escape liability it must show that it has discharged the full measure of its legal duty and was in nowise to blame for the accident."

The least that can be said is that, if the defendant's car stopped in the manner described by plaintiff, it would warrant the jury in finding that defendant was guilty of "unskilful handling" of the car. This, under some of the authorities cited by defendant, would be negligence. We therefore conclude that the evidence was sufficient to sustain the verdict, and justified the giving of instruction No. 3.

2. Error in refusing to give defendant's requests 6 and 7. To have given these instructions would have been tantamount to directing a verdict for the defendant. They were properly refused.

3. It is urged that the court erred in its statement of the issues, by reciting the averments in the petition with reference to negligence on the part of the conductor. It is argued that, as the court intended to withdraw this issue from the jury and submit only the negligence of the motorman, the allegations in relation to such issues should not have been embodied in the charge of the court to the jury. We agree with counsel in this contention; but we are unable to see how the action of the court could have prejudiced defendant. Instruction No. 1 is a brief statement of the substance of the allegations in the petition as to what was said and done by plaintiff when she entered the car, and as to the action of the conductor in starting the car before she had time to alight. It then properly states the allegations as to the negligence of the motorman. If the trial court had not, by the most explicit and unqualified language, eliminated from the case everything but the allegation of negligence on the part of the motorman, and limited the jury to a consideration of that charge of negligence alone, there would be good ground for the complaint made. But we are unable to see how the court could more clearly have told the jury that they were not at liberty to consider anything in the pleadings or in the evidence, except the allegation of negligence on the part of the motorman and the evidence pertaining thereto, than was done in instruction No. 3, above set out. We think this

instruction relieved the case of any error there may have been in reciting in the statement of the case the allegations of the petition as to other acts of negligence.

4. The fourth assignment is based upon instruction No. 41½, in which it is argued that the court erred in defining the effect of contributory negligence. This assignment cannot be considered, for the reason that the instruction now complained of was not excepted to by defendant at the time it was given, nor called to the attention of the trial court in the motion for a new trial.

5. By the fifth assignment it is urged that the verdict and judgment are excessive. At the time of the accident plaintiff was 38 years of age. The testimony shows that she had not yet reached the age of 40 years at the time of the trial. She had suffered from Pott's disease in her childhood, and there is some medical testimony to the effect that at the time of the trial she was still troubled with that disease. She also had quite a curvature of the spine. This curvature was such that she was commonly known as a "hunchback." She had been in this condition since she was ten months old. The evidence shows that for many years she had supported herself; that for some time prior to and at the time of receiving her injury she was earning "from \$75 a month up," which would be from \$900 to \$1,000 a year. Her disease had apparently spent its force many years prior to the injury complained of, and no longer affected her general health or interfered with her performing the duties of the several avocations in which she had been engaged. She testified that for about five years she was in the millinery business; that for about three years she was cashier and bookkeeper for a mercantile company; that one year she was saleslady and had charge of the books in a grocery store; that at one time she carried on a cut-flower department in one of the leading stores; that she worked for an eastern firm, introducing a treatment that she understood; that at the time of the injury she was a representative of the Vimedia Company of Kansas City, introducing it in the city of Omaha. She was asked, and

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answered, the following questions: "Q. From the time that you can remember up until the time that you met with the injury that you complain of, what has been your general health? A. Most always very good. Q. State whether or not you were at any time, on account of the condition of your back or your spine, prevented from doing the work that you had before you? A. I never remember any time at all in my life. Q. And any disability was always outside of that, as I understand it? A. Yes, sir. Q. Was it temporary or was it of a permanent, lasting character? A. Oh, just a day or so. Q. How did you feel generally? Were you active or otherwise? A. Very, very active on my feet. Q. How has your mind been? A. Very active." In the light of this testimony, we think the jury would be warranted in believing that she had a fair chance of at least living out her expectancy of life, which was 28 years. Considering that expectancy, and the amount of money she was earning in her business, and adding to that the pain and suffering which she had endured and was sure to endure in the future, we cannot say that the verdict of \$10,500 was excessive.

Finding no prejudicial error in the record, the judgment is

AFFIRMED.

HARRY M. PAYNE, APPELLEE, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, APPELLANT.

FILED APRIL 15, 1916. No. 18637.

Carriers: SHIPMENT OF LIVE STOCK. In the absence of a special contract, or special circumstances which take the case out of the general rule, a carrier of live stock is not bound to use extraordinary means to forward a shipment of stock. In such case the shipper will be held to have consented to the carriage of such stock by the regular trains of the carrier on its ordinary schedules.

Payne v. Chicago, M. & St. P. R. Co.

APPEAL from the district court for Douglas county: **LEE S. ESTELLE, JUDGE.** *Reversed and dismissed.*

Crofoot, Scott & Fraser, for appellant.

Earl R. Ferguson and Harry W. Shackelford, contra.

FAWCETT, J.

From a judgment of the district court for Douglas county, in favor of plaintiff, in an action for damages for alleged negligence of defendant in failing to transport, within a reasonable time, a shipment of live stock, defendant appeals.

The case was submitted to the court upon a stipulation of facts as follows:

"It is hereby stipulated by and between the parties hereto that the plaintiff in the above-entitled case delivered the shipment referred to in his petition, consisting of twenty-nine (29) head of cattle and three (3) head of calves, to the defendant company at Luther, Iowa, for transportation to South Omaha, Nebraska, between 5:30 and 6 o'clock P. M., on May 1, 1911, and that the defendant's train conveying the said shipment left Luther at about 6:15, and arrived at Madrid at 6:45 P. M. That the shipment arrived at Council Bluffs, Iowa, at 5:15 P. M., on May 2, 1911, and was delivered at the stock-yards chutes in South Omaha at 9:30 o'clock the same evening.

"That the distance from Luther to South Omaha by way of the lines of the defendant and connecting carriers is one hundred sixty-three and six-tenths (163.6) miles. That the time consumed by the defendant in transporting this shipment is about twenty-seven and one half (27½) hours.

"It is further stipulated that the station of Luther is on a branch line of the defendant railroad, about seven (7) miles distant from Madrid, which is the junction point connecting the said branch with the defendant's main line between Omaha and Chicago. That Perry is the first division station west of Madrid on the defendant's line and is one hundred thirty (130) miles from South Omaha. That the

defendant's printed time schedules show that the first regular freight train is due to leave Madrid at 2:10 o'clock A. M., and is due to arrive at Council Bluffs at 5:30 o'clock P. M. of the same day, and to arrive at Omaha at 8 o'clock P. M. on the same day. That the usual time required to deliver shipments from Omaha to the stock-yards chutes in South Omaha is about one and one-half ($1\frac{1}{2}$) hours. That the said schedules show that the regular freight trains leaving Omaha east-bound maintain an average speed of eighteen (18) miles per hour between Omaha and Madrid, including time consumed in stops at stations en route, and also between Madrid and Chicago, Illinois. That this shipment moved west from Madrid, Iowa, on the first train down in the said schedule after the time of its arrival at that point, the schedule time for the departure of the train from Madrid being 2:10 o'clock A. M., and the schedule time of arrival at Omaha, Nebraska, being 8 o'clock P. M.

"That no special contract was entered into or any agreement made respecting the particular train said stock should be transported on.

"That both the parties waive a jury and agree to try the said case to the court. That neither party shall be understood to waive objection to any of the foregoing facts, and that the competency, relevancy and materiality of any of the foregoing facts may be called in question by either party at the trial of the said case. That either party may at the trial of the said case offer further evidence bearing upon the question of the defendant's unreasonable delay in transportation of the said shipment, but it is agreed that if the court, after hearing all of the evidence, should find that the defendant failed to transport the said shipment to destination with due diligence and without unreasonable delay, the plaintiff shall have and recover judgment from the defendant in the sum of fifty-six dollars and fifty-nine cents (\$56.59), with interest thereon at the rate of 7 per cent. per annum from May 2, 1911, to date, and his costs."

From this stipulation it appears that Luther, Iowa, was on a branch line of defendant road. The cattle were delivered to defendant between 5:30 and 6 o'clock in the evening. They were at once loaded, and left Luther about 6:15, arriving at Madrid (seven miles distant) on the main line at 6:45. The first regular west-bound train due to leave Madrid was at 2:10 A. M. the following morning. It was due to arrive at Council Bluffs at 5:30 P. M., at Omaha at 8, and at South Omaha about an hour and a half later, or at 9:30. The stock was shipped from Madrid on that train. It arrived at Council Bluffs at 5:15, which was 15 minutes ahead of schedule time, and delivered at the stock-yards chutes in South Omaha at 9:30. The distance from Luther to South Omaha is 163.6 miles. If the defendant is liable, it is not because it was guilty of negligence in not transporting the stock promptly under its published schedules, but because it was operating its trains under too slow a schedule.

In *Johnston v. Chicago, B. & Q. R. Co.*, 70 Neb. 364, we held: "In order to recover damages for an alleged delay in the shipment of live stock, it is necessary to introduce some competent evidence tending to show the length of time ordinarily required to transport the shipment from the place where received to the point of delivery, and that a longer time was actually consumed than was necessary for that purpose." This holding was later approved and followed in *Cleve v. Chicago, B. & Q. R. Co.*, 77 Neb. 166. We think the evidence was insufficient to take this case out of the rule there announced.

In *Pine Bros. v. Chicago, B. & Q. R. Co.*, 153 Ia. 1, it is held: "A railway company is not required to attach a freight car carrying live stock to a passenger train to hasten its delivery; and where it transports the same by its usual freight trains on schedule time, and there is no evidence that there were faster freight trains by which the destination could have been sooner reached, it is not liable for the death of an animal, the result of sickness, while in transit." In the opinion it is said: "The defendant's

freight schedules upon which the road was then being operated were so arranged that a car sent out of Bushnell on the afternoon or evening of May 5, 1908, and making all the connections provided for in said schedules, would not arrive in Diagonal until about noon of May 8. There is no claim that plaintiffs did not fully understand the time required to make this trip, or that they asked for or received any assurance that the progress of their car could or would be accelerated beyond the rate indicated by the schedule."

In *Johnson v. New York, N. H. & H. R. Co.*, 111 Maine, 263, it is held: "(4) In the absence of a special contract, or of special circumstances which take the case out of the general rule, the carrier is not bound to use extraordinary means to forward even perishable freight." "(6) The shipper must be understood to contemplate carriage by the regular trains on the ordinary schedules. If he desires special service, he may contract for it."

In *Tiller & Smith v. Chicago, B. & Q. R. Co.*, 142 Ia. 309, it is held: "Unless the carrier contracts to deliver stock by a special train, it may make such reasonable train schedules as are proper to the ordinary and economical conduct of its business, having regard to the nature of the stock to be transported."

Four Texas cases and one from Oklahoma are cited, which seem to be in conflict with the foregoing authorities and to sustain plaintiff's contention. We have carefully examined those cases, but they have failed to satisfy us that the rule announced in our own cases and in the cases from Iowa and Maine, above cited, are unsound. When this shipment was made, plaintiff was charged with knowledge of the published schedules of defendant. That they were published is admitted in the stipulation, and no denial of knowledge thereof by plaintiff is claimed. He therefore knew that the stock which he delivered to defendant at Luther, Iowa, at 5:30 in the evening of May 1 could not possibly, under those published schedules, reach South Omaha in time for the next day's market, nor until late

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in the evening of that day. Under the authorities upon which we prefer to rely, he made his shipment, knowing that it would be made in accordance with those schedules, and without asking for or receiving any agreement or intimation from the defendant that the progress of his shipment "could or would be accelerated beyond the rate indicated by the schedule."

Plaintiff having failed to sustain the allegations of his petition, and it being clear that all of the evidence which could be produced by him in support of his claim is contained in the stipulation, the judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

SEDGWICK and HAMER, JJ., not sitting.

FIRST NATIONAL BANK OF SUTTON, APPELLEE, v. FRED
SCHIERMEYER ET AL., APPELLANTS.

FILED APRIL 15, 1916. No. 18382.

1. **Trial: DIRECTION OF VERDICT: SPECIAL FINDINGS.** In an action at law the trial court is not required to make special findings when directing the verdict of the jury.
2. ———: ———. There being no evidence which would support a verdict for defendant, the trial court did not err in instructing the jury to find a verdict for the plaintiff.

APPEAL from the district court for Thayer county: LESLIE G. HURD, JUDGE. *Affirmed.*

Morning & Ledwith, C. L. Richards and Weiss & Weiss,
for appellants.

W. E. Goodhue, M. L. Corey and Mockett & Peterson,
contra.

SEDGWICK, J.

This action was upon a promissory note, and the defense was that the note was given for a hay baler, which was warranted, and was not as warranted. The court instructed the jury to find a verdict for the plaintiff, which was done, and judgment accordingly, and defendants have appealed.

The first objection is that the court erred in not stating the ground of the ruling. It is generally necessary in moving for an instructed verdict to state the ground of the motion for the information of the court. Under some circumstances it has been held that unless the ground of the motion is stated no error can be predicated upon refusal of the motion. When the motion is based upon the failure of evidence, it is generally held that the point relied upon must be specified. *Yeager v. South Dakota C. R. Co.*, 31 S. Dak. 304. The statute does not require special findings in an action of this kind.

The contract of warranty contained provisions for furnishing defective parts, and similar provisions, but there is no claim of evidence of failure of the company in these respects.

The contract provided: "The Luebben Baler Co. guarantees that when baler is run 150 revolutions per minute of its drive shaft, and the carrier is kept full of hay spread uniformly, it will bale three tons per hour, and the capacity will be increased with the increased speed of the baler." The defendants testified: "Q. You may state how the baler worked. A. Well, the hay in the stack, it was really damp, and it wouldn't go through the rollers at all, and it would elog up on the spindles and it would run up onto the belt so we couldn't do hardly anything with it, and they had put on a new spreader and it wouldn't work on there either, so finally we raised the spreader up, and stood there with forks and spread the hay with the forks on the feeder." Other similar testimony is quoted in the brief of defendant. No evidence is referred to in the brief which tends to

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show that the baler was run as specified in the warranty, or that it was ever satisfactorily tried with hay suitable for the purpose. There is quite a volume of evidence, and we have not observed evidence tending to prove that the baler failed upon a fair trial as contemplated by the contract. As no substantial failure of the warranty appears, it is immaterial whether the plaintiff is a *bona fide* holder of the paper under the negotiable instruments law.

The judgment of the district court is

AFFIRMED.

LETTON J., not sitting.

L. D. POWELL, APPELLANT, v. NORMAN P. MAYHEW ET AL,
APPELLEES.

FILED APRIL 15, 1916. No. 18514.

1. **Appeal in Equity: TRIAL DE NOVO: CONFLICTING EVIDENCE.** This court is required to try equity cases *de novo* without reference to the findings of the trial court; still when the important evidence in the case was taken before the trial court, and that court has construed the conflicting oral evidence of witnesses, and the record shows which witnesses must have been relied upon in determining doubtful facts from such conflicting evidence, this court will carefully consider the construction that the trial court must have given to such conflicting evidence.
2. **Evidence found to support the findings and decree of the trial court.**

APPEAL from the district court for Cherry county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

A. M. Post and Albert & Wagner, for appellant.

J. J. Harrington and Walcott & Walcott, contra.

SEDGWICK, J.

In March, 1910, this plaintiff made a contract with defendants whereby he exchanged 960 acres of land in

Cherry county, in this state, for 280 acres in Montgomery county, Iowa. The greater part of the Iowa land was owned by the defendant Norman P. Mayhew, and a small piece was owned by his son, the defendant Max Mayhew. In the exchange the defendants agreed to pay plaintiff a difference of \$7,800, and to secure this the defendants gave plaintiff five notes, one for \$1,000 and four notes for the aggregate sum of \$6,800, all secured by as many mortgages on different parts of the Nebraska land. Afterwards the plaintiff began five several actions in the district court for Cherry county to foreclose the mortgages. The defendants answered in each action alleging fraud on the part of plaintiff in securing the contract of exchange of lands. The five actions were consolidated and tried together. The court found that the contract was obtained by fraud and misrepresentation on the part of the plaintiff, and that the defendants were damaged more than the amount of the mortgages. A decree was entered canceling the mortgages and quieting the title of defendants in the Nebraska land. The plaintiff has appealed.

The plaintiff contends that the defendants have failed to prove: (1) That the alleged false representations were actually made; (2) that the alleged false representations were relied upon by the defendants; (3) that the alleged false representations were made under circumstances justifying the defendants to rely upon them; (4) the facts necessary as a basis for the computation of damages.

The record is very large. We cannot attempt an analysis of either the pleadings or the evidence. The case is a difficult one. We have with hesitation concluded that the judgment of the trial court must be affirmed. The several answers of the defendants are complicated and involved. Many of the representations alleged to be false were, if made, of such a nature as these defendants had ample opportunity to test them by personal investigation. It appears that the defendants are farmers and familiar with lands and land values. They went to the land for which they bargained for the purpose of independent examination

thereof. They made inquiries of the person occupying the land and were freely informed by him as to the condition of the land. They do not, so far as we have observed, contend that he misinformed them in any particular. Ordinarily these facts would defeat their claims. Some of the alleged false representations, however, were as to the quality of the land and what it had produced, and perhaps some other particulars which were within the knowledge of the plaintiff. When the defendants saw the land, it was in March and some snow was on the ground. While they were there a storm arose, accompanied with snow, and during the night following the ground was entirely covered with snow. They testify that they were practically driven away from the land by the storm, and were prevented from returning the following morning by the snow and cold, and so returned to their home in Iowa without opportunity to ascertain the facts in regard to the representations which had been made. The plaintiff also resided in Montgomery county, Iowa, and was somewhat of a speculator in lands. He was assisted by a shrewd land agent. The evidence of these witnesses was conflicting. To see them and hear them testify would be of great assistance. Indeed, we have frequently said that, while the statute requires us to try equity cases *de novo* upon appeal without reference to the findings of the trial court, still when the important evidence in the case was taken before the trial court, and that court has construed the conflicting oral evidence of witnesses, and the record shows which witnesses must have been relied upon in determining doubtful facts from such conflicting evidence, this court will carefully consider the construction that the trial court must have given to such conflicting evidence. In determining whether the plaintiff knew that the defendants were relying upon his representations in regard to the land, and whether the defendants were qualified to, and did, discover the facts, and, if they did not, whether it was owing to their negligence that they failed to do so, or was owing to the circumstances surrounding them, and a justifiable reliance upon the fairness

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of the plaintiff, and other difficult questions involved, an opportunity to see and hear these witnesses while testifying and to observe their characteristics and their respective qualifications would be of the highest importance.

Under these circumstances the trial court found that many representations were made by plaintiff, some of which are of such a nature that the defendants might believe and rely upon them. The court, from the conflicting evidence before him, has found that the defendants did rely upon these representations. These are clearly shown by the evidence to be untrue. The finding that the Nebraska land is of less value than it would be if as represented is supported by the evidence. This difference, as found by the court, was more than the amount of the notes and mortgages. Construing the oral evidence as the trial court evidently did, we conclude that the findings are sustained by the evidence, and the judgment of the district court is

AFFIRMED.

MORRISSEY, C. J., not sitting.

ROSE, J., dissents.

HAMER, J., concurs in the conclusion.

J. WARREN KEIFER, JR., APPELLEE, V. ARCHIBALD M. SHAMBAUGH, APPELLANT.

FILED APRIL 15, 1916. No. 18843.

1. **Waters: DIVERSION: ADJOINING LANDOWNERS.** A landowner may not rightfully collect and divert either waters of a watercourse or surface waters and discharge them onto the land of his neighbor to the latter's damage.
2. ———: ———: **INJUNCTION.** It is the plaintiff's right to occupy and use his land for such lawful purposes as he sees fit, and unincumbered by an overflow of surface water or water in a watercourse, accumulated, arrested and discharged in a body, by the owner or occupant of adjoining land; and for the protection of such right injunction will lie.

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APPEAL from the district court for Nuckolls county:
LESLIE G. HURD, JUDGE. *Affirmed.*

L. H. Blackledge, for appellant.

Buck, Brubaker & Buck, contra.

HAMER, J.

The plaintiff and appellee, J. Warren Keifer, Jr., owns a farm in Nuckolls county adjoining a farm owned by the defendant and appellant, Archibald M. Shambaugh. Oak creek, a natural watercourse, runs across the defendant's farm. The defendant constructed a dam across Oak creek, and a dyke which extends therefrom obstructs this watercourse and discharges the waters thereof, together with surface waters collected thereby, in a body upon and across the adjacent farm of the plaintiff. The waters diverted cause continuing damage to the land of the plaintiff by destroying the crops which would otherwise be raised thereon. Because of this destruction, the plaintiff appears to be without a remedy at law. The defendant, from time to time, repairs and maintains said dam and said dyke, and for the sole purpose of obstructing and diverting the waters of said stream and causing them to be discharged upon the farm lands of the plaintiff, and against the plaintiff's repeated objections and protests, and without obtaining his consent in any way. The plaintiff claims that the evidence is sufficient to entitle him to a decree for an injunction. The defendant has pleaded an alleged oral agreement with the plaintiff under which he claims that he has a right to so divert said waters. This agreement is denied in the reply. It is claimed by the plaintiff that the agreement set out by the defendant is not proved to be the agreement made, and that said agreement, as alleged in said answer, is only a part of the agreement made, the other part of which the defendant repudiates and denies. It is claimed by the plaintiff that the agreement which is alleged by the defendant fails to give to the defendant the right to flood the plaintiff's land or to discharge said water thereon. Dis-

charging said water on the plaintiff's land is the real wrong of which the plaintiff complains. It is the wrong admitted to be remedied by the decree entered in the trial court.

There was an amendment made to the petition at the trial and by reason of the suggestion of the court. It was filed as complained of in the defendant's brief. The substance of the amendment was, and is: (a) That in the fall of 1903 T. M. Shambaugh, the father of the defendant, who was then the owner of the defendant's farm, to wit, the northwest quarter of section 27, township 1, range 8, agreed with plaintiff that, if plaintiff would furnish land at the west side of his farm for a drainage ditch, he (Shambaugh) would construct, maintain and keep up ditches and dykes sufficient to carry the combined waters of Oak creek and Dry creek through said ditch, and would thus prevent any of said waters from flowing across onto the plaintiff's lands to the east of said dyke so to be built on the east of said drainage ditch. (b) Said drainage ditch and dyke and dam were constructed pursuant to said agreement, and were not completed until May, 1904, and they were first used in July of said year. (c) Said agreement was oral and permissive only, and was expressly conditioned upon the defendant keeping up and repairing the said dykes. (d) The defendant refuses to repair the dykes on plaintiff's land, but maintains and repairs the dam and dyke on his own land, so as thereby to throw said waters across the farm lands of the plaintiff, to his irreparable injury, and in violation of the express condition upon which said dam and dykes were to be built and used.

The amendment does not appear to be necessary, because it did not change the issues, and does not make admissible in evidence that which was before inadmissible, nor did it state any new or different cause of action, nor did it vary the remedy originally sought. The wrongful and unlawful diversion from their natural course of the flowage of the waters in Oak creek, together with the surface waters, by means of said dam and dyke on defendant's land, there-

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by causes such waters to be discharged on the plaintiff's adjacent lands, and this is the wrong of which the plaintiff complains. After the amendment it still remains the distinct wrong.

J. Warren Keifer, Jr., testified that the plaintiff owns the east half and the defendant the west half of section 27, township 1, range 8. Dry creek, a draw carrying water only in wet times, comes from Kansas northward through the bluffs on plaintiff's land about 250 or 300 yards west of section 27, whence it originally spread its waters northward across plaintiff's land. Oak creek comes northward through the bluffs on plaintiff's land about 250 or 300 yards west of the plaintiff's east line, and thence runs in a northerly direction in a well-defined channel from 4 to 10 feet deep, with natural timber along its course, passing between defendant's house and barn, and continuing clear across defendant's north eighty, and nowhere touching plaintiff's west line. The land along plaintiff's west line east of Oak creek is higher than the land west of Oak creek, and the overflowing waters from Oak creek originally flowed out west of the creek. Oak creek is larger than Dry creek, and drains a more extensive territory and carries more water.

In the fall of 1903, and the late spring of 1904, T. M. Shambaugh built a dyke or dam across Oak creek, and a ditch and dyke running eastward therefrom to a ditch which is built northward on the west part of plaintiff's land, and also a ditch and dyke from the south end of said north and south ditch in a southeasterly direction to the bluff at the east side of the mouth of Dry creek. Before the building of said dykes and ditches no part of the waters of Oak creek came upon plaintiff's land from the west, and said dykes and ditches diverted all of said waters toward plaintiff's land; and, because of defendant's failure to keep up the dykes on plaintiff's side of the ditch, said waters flowed over and now flow over and run across the plaintiff's said farm lands.

On cross-examination J. Warren Keifer, Jr., testified touching the agreement as follows: There was talk about between Shambaugh and plaintiff of making a joint ditch, but the arrangement was finally made that the ditch should be constructed on the plaintiff's side of the line by Mr. Shambaugh bearing all the expense and keeping it up. Shambaugh was to do all the work and keep up the ditch. Keifer testified that he was quite sure that it was a part of the bargain that Shambaugh was to keep up the ditch.

Arthur Stanley testified that it was stated at the time that the ditch was to run west to where Oak creek crossed the road to go north, and that Mr. Shambaugh suggested that the ditch should run south and west to catch the waters of Oak creek at the bluff, and that he (Shambaugh) would do the work if Mr. Keifer would furnish the land, and he would also keep up the ditch. Stanley was sure that Shambaugh so stated, and was also sure that the ditch was afterwards dug in the manner that was that day proposed.

Stanley Sutherland testified that he heard Shambaugh say that he had agreed to maintain the ditch and dyke. This was in the presence of J. P. Hostick. J. P. Hostick himself testified to the conversation with Shambaugh in the presence of Stanley Sutherland, and that Shambaugh said that he had agreed to maintain the ditch and dyke, or words to that effect.

On rebuttal, J. Warren Keifer, Jr., testified that the matter was talked over a good deal, and that the final agreement was that he (Keifer) was to furnish the land for the ditch, and that Shambaugh was to do all the work and was to maintain the ditch, and the two creeks were to be thrown together, as was afterwards done, and that the defendant failed and refused to maintain the ditch and dyke on the plaintiff's land.

The defendant on cross-examination testified that he did not have any intention of repairing the ditch and the dyke: "A. No, sir; not a bit. Q. And you don't have

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yet? A. No, sir." But nevertheless the defendant was keeping up and raising the dam and dyke on his own land so as to dam up and divert Oak creek. He testified: "A. I have repaired it; I put approximately a day's work on that dyke I guess every year I have been there."

Oak creek, which is being diverted across plaintiff's land, has a well-defined channel. It is a natural drainage channel. The dam and dykes which divert Oak creek and part of the ditches were not constructed until the spring of 1904, less than 10 years before the commencement of this action. T. M. Shambaugh testified: "Well, the Keifer side was finished that fall. We didn't get all through with my side on Oak creek until the spring. We had to throw up a levee there; that is the reason that it washed out so bad there, because it was loose dirt." Arthur Stanley testified that the ditches were not all built until the spring of 1904.

The evidence clearly establishes a continuing and irreparable injury. The judgment of the court is within the issues of the case as made on the original pleadings. The petition alleges the wrongful diversion of the waters of a natural watercourse to and across the farm lands of the plaintiff, to the destruction of his crops and the injury of the soil. The answer denies generally the said allegations, and pleads as a matter of defense an agreement under which the defendant asserts a right to divert said waters into a ditch on plaintiff's land. And the reply to said new matter, being a general denial, puts in issue, not only the making of such an agreement, but the form and substance in the agreement. Under the issues the plaintiff was entitled to prove whether or not an agreement was made and the exact nature of the agreement. The answer having set up new matter, namely, an alleged agreement which was denied in the reply, the burden was on the defendant to prove the very agreement alleged. *Williams v. Evans*, 6 Neb. 216.

If the amendment was necessary to conform the pleadings to the facts proved, it must be presumed that the court allowed such amendment in the furtherance of justice, and that such action was without prejudice. We are unable to see that the defendant was prejudiced in any way by the amendment.

In *German Ins. Co. v. Frederick*, 57 Neb. 538, the plaintiff after the trial was permitted to amend the petition and reply so as to admit that the premises were vacant. It was held that there was no error in this. It was said: "The evidence had gone in on this issue without objection based on its irrelevancy, and the amendment was a proper one to conform the pleadings with the proof."

In *Whipple v. Fowler*, 41 Neb. 675, it was held, as stated in the syllabus: "Where, upon the trial of an action, testimony is admitted without objection, it is not error for the court to permit the pleadings to be amended to conform to the proof."

In *Blakeslee v. Van der Slice*, 94 Neb. 153, it was held, as stated in the syllabus: "It is usually a matter within the discretion of the district court to allow or refuse to allow a pleading to be amended to conform to the evidence; and, in order to predicate error in allowing the amendment, it must be shown that the trial court has abused its discretion."

The injury which is complained of is an injury to real estate. It is such an injury as to be the object of equitable cognizance and protection by injunction. *Jacobson v. Van Boening*, 48 Neb. 80.

In the above case it was stated in the syllabus: "Against a continuing injury to land caused by an unlawful discharge of surface waters by an adjoining proprietor, equity will afford relief by injunction."

In *Ayres v. Barnett*, 93 Neb. 350, it is said, among other things, in the syllabus: "An owner of real estate is not required to permit the devastation of his timber land by a trespasser and seek relief in an action at law for damages. He may prevent such trespass by injunction."

The injury is a continuing one, and therefore it presents a proper ground for injunction.

In *Sillasen v. Winterer*, 76 Neb. 52, it was held, as stated in the syllabus: "Concerning simple acts of trespass equity has, in most cases, no jurisdiction, but, if the nature and frequency of trespasses are such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land, an injunction will be granted." The cases cited in *Lynch v. Egan*, 67 Neb. 541, *Pohlman v. Evangelical Lutheran Trinity Church*, 60 Neb. 364, and *Peterson v. Hopewell*, 55 Neb. 670, are along the same line.

As the injury went to the destruction of plaintiff's estate, it was an irreparable injury within the meaning of the law relating to injunctions. *Eidemiller Ice Co. v. Guthrie*, 42 Neb. 238.

Because of the frequent recurrence of the injury, the jeopardizing of the value of the inheritance, and the ripening of the period of prescription, and the necessity of a multiplicity of successive suits at law to recover the damages, even if they could be measured and determined, the plaintiff has no adequate remedy at law.

The diversion of a watercourse on plaintiff's farm lands is unlawful. *Nelson v. Wirthele*, 88 Neb. 595; *Kane v. Bowden*, 85 Neb. 347; *Roe v. Howard County*, 75 Neb. 448.

In *Nelson v. Wirthele*, *supra*, the syllabus reads: "A landowner is entitled to an injunction to restrain the erection and maintenance of a dam in an old established drainage channel, partly natural and partly artificial, and the digging of a ditch, where the effect would be to collect and divert waters flowing therein and cast them in a body on his lands, which they would not otherwise reach."

In *Kane v. Bowden*, *supra*, it was said in the syllabus: "Water flowing in a well-defined watercourse, whether swale or creek in its primitive condition, may not, except in the exercise of the power of eminent domain, lawfully be diverted and cast upon lands of an adjoin-

ing proprietor where it was not wont to run according to natural drainage.

"A person may not, except in the exercise of the power of eminent domain, lawfully concentrate surface waters and discharge them through an artificial ditch in unusual quantities upon lands of an adjacent owner to his damage."

In the body of that opinion it is said: "The instant case is within the principle announced in *Roe v. Howard County*, 75 Neb. 448, and *Gregory v. Bush*, 64 Mich. 37. That is to say, that water flowing in a well-defined water-course cannot be lawfully diverted and cast upon the lands of an adjoining proprietor where it was not wont to run in the course of natural drainage, and that a person may not lawfully concentrate surface water and discharge it through an artificial ditch in unusual quantities upon lands of an adjacent owner to his damage."

In *Roe v. Howard County*, *supra*, it is said in the syllabus: "Where water, be it surface water, the result of rain or snow, or the water of springs, flows in a well-defined course, be it ditch or swale or draw in its primitive condition, and seeks its discharge in a neighboring stream, its flow cannot be arrested or interfered with by a landowner to the injury of the neighboring proprietors, and what a private proprietor may not do neither can the public authorities, except in the exercise of the right of eminent domain."

The instant case is an ordinary case in equity instituted to restrain the defendant from repeating his acts of continuing injury and damage to the plaintiff's lands and crops. T. M. Shambaugh, who built the dam across Oak creek and the dykes and ditches, maintained them during the years he continued to occupy the farm. The son seems to have been unwilling to do what his father had done according to the agreement made. The defendant admitted that he had no intention of protecting the plaintiff by maintaining the dykes that his father had constructed on the plaintiff's land. The defendant hav-

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ing abandoned the agreement which his father made as to maintaining the dyke on the east margin of the artificial ditch on the land of the plaintiff, while still repairing and keeping up the dam across Oak creek and the dykes leading therefrom to the plaintiff's land, disregarded the rule of law to the effect that a landowner cannot collect and divert either the waters of a watercourse or surface waters and discharge them onto the land of his neighbor, to the neighbor's damage.

"The owner of a natural pond or reservoir wherein the surface water from the surrounding land accumulates, and from which it has no means of escape except by evaporation or percolation, cannot lawfully, by means of a ditch, discharge such water upon the land of his neighbor, to his injury." *Davis v. Londgreen*, 8 Neb. 43. In that case it is said in the body of the opinion: "Now, it is certain that the plaintiff has the absolute right to occupy and use his land for such lawful purpose as he sees fit, unincumbered by the periodical floodings complained of. And this is one of those substantial rights incident to the property itself, to protect which an injunction will always be granted. * * * A correct test for determining whether an injunction is the appropriate remedy was given, we think, by the supreme court of Wisconsin, in *Pettigrew v. Village of Evansville*, 25 Wis. 223, wherein the threatened nuisance was essentially the same as that committed by the defendant here."

The judgment of the district court is right, and it is

AFFIRMED.

LEETON, J., concurs in the conclusion.

SEDGWICK, J., not sitting.

HARRY J. SMITH, APPELLEE, v. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, APPELLANT.

FILED APRIL 15, 1916. No. 18360.

1. **Appeal: CONFLICTING EVIDENCE.** "In a law action, where the evidence upon any disputed question of fact is sufficient to sustain a finding either way, the finding of the trial court thereon will be sustained on appeal." *Holmwig v. Dakota County*, 90 Neb. 576.
2. **Statutes: CONSTRUCTION.** "In construing an act of the legislature all reasonable doubts must be resolved in favor of its constitutionality." *State v. Standard Oil Co.*, 61 Neb. 28.
3. **Carriers: REGULATION.** "Section 4, art. XI of the Constitution, does not prohibit the legislature from increasing the common law liability of common carriers." *Cram v. Chicago B. & Q. R. Co.*, 84 Neb. 607.
4. ———: "SPEED STATUTE:" CONSTITUTIONALITY: ELECTION OF REMEDIES. Sections 6018, 6019, Rev. St. 1913, known as the "speed statute," do not limit the liability of railroads as common carriers. This statute affords the shipper of live stock a statutory remedy, in addition to the common law remedy, by which he may recover liquidated damages sustained by reason of the unreasonable delay defined by the act, in the transportation of live stock from the initial point of shipment to the place of feeding or destination. This statute is not repugnant to section 4, art. XI of the Constitution. The common law remedy is not abrogated by the "speed statute." The shipper has an election of remedies; he may still bring his action under the common law, and recover for the actual damages sustained.
5. ———: CLAIMS: ATTORNEY'S FEES: STATUTORY PROVISION: CONSTITUTIONALITY. The due process of law and the equal protection of the law, guaranteed by the fourteenth amendment to the Constitution of the United States, are not denied to common carriers by section 6063, Rev. St. 1913, which provides for the recovery of a reasonable attorney's fee to be fixed by the court, in actions on claims for loss or damage to property in any manner, or overcharge for freight for which any common carrier in the state may be liable, not adjusted and paid within the time limited by statute, and when the amount recovered exceeds the amount tendered by the carrier. This statute only applies to claims for loss or damage to property received by the carrier for shipment as freight,

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and for overcharge for freight. This statute being applicable to all persons and corporations engaged in the business of common carriers in the state, and applying only to a limited kind of claims admitting of special legislative treatment, is not repugnant to the due process and equal protection provisions of the fourteenth amendment.

6. ———: ———: ———. Reasonable attorney's fees are properly assessed under section 6063, Rev. St. 1913, when the plaintiff is represented by an attorney of record.

APPEAL from the district court for Douglas county:
ABRAHAM L. SUTTON, JUDGE. *Affirmed.*

A. A. McLaughlin, Lyle Hubbard and Wymer Dressler, for appellant.

Earl R. Ferguson and Harry W. Shackelford, contra.

McGIRR, C.

The plaintiff brought this action to recover damages in the sum of \$78.77, which he alleged he sustained because of unreasonable delay occasioned by the defendant in the shipment of one car-load of cattle from Tyson, Nebraska, to South Omaha, Nebraska, on January 4, 1912, and to recover an attorney's fee in the sum of \$50 in addition to such damages. The plaintiff alleged in his petition that the defendant is a railroad corporation, operating a railroad from Tyson, Nebraska, to South Omaha, Nebraska, and is a common carrier of freight over said railroad; that on the 3d day of January, 1912, at 12 o'clock P. M. of said day, the plaintiff delivered to the defendant, at said town of Tyson, for shipment to South Omaha, a consignment of 22 head of cattle, consisting of one car-load; that the distance over defendant's said line of railroad from Tyson to South Omaha is 35 miles, and the usual, customary and reasonable time required for conveying a shipment of live stock over defendant's said railroad from Tyson to South Omaha is not to exceed 3½ hours; that, had this shipment been conveyed to destination within a reasonable time, the same would have arrived in prime condition

and in ample time to have enabled the plaintiff to have sold his said cattle on the early morning market for the highest price of that day; that defendant unreasonably delayed said shipment in transit for a period of 7 hours longer than was reasonably necessary, and did not deliver said shipment at destination until 10:45 o'clock A. M. on January 4; that, by reason of said delay, the cattle shrunk in weight 30 pounds per head in addition to the usual shrinkage on such a shipment, to plaintiff's damage in the sum of \$34.25; that, by reason of the exhausted condition and gaunt appearance of the cattle upon their arrival at the market, there was a further loss of 5 cents per hundredweight due to depreciation in grade and quality, amounting to \$11.13; that when the cattle were delivered at destination the market price of such cattle had fallen 10 cents per hundredweight below the earlier market of that day, causing a further loss of \$33.39, and that plaintiff's total damages aggregated \$78.77. The plaintiff further alleged that he filed his claim for said damages with defendant, as provided by law, on January 16, 1912; that more than 90 days had elapsed since the filing of said claim; that the same had not been paid; and plaintiff prayed judgment for an attorney's fee in the sum of \$50 in addition to his said damages.

The defendant by its answer admitted the shipment of said cattle; denied all other allegations in the petition; and alleged that its line of railroad from Tyson southward terminates at Omaha; that said shipment of cattle was transported by it from Tyson to Omaha with all due care and dispatch, and was there delivered to its connecting carrier, the Missouri Pacific Railway Company; that under the contract of shipment it was agreed that defendant should not be liable for any delay to said shipment not occurring on its own line; that the weather was extremely cold, which rendered it difficult for defendant to operate its trains within the time which they could

be operated in good weather. The plaintiff's reply was a general denial.

The jury found for the plaintiff and returned a verdict for \$85.77, and for an attorney's fee of \$50. The plaintiff thereafter filed a remittitur amounting to \$12.13, being the item of damages for the gaunt appearance of the cattle, and the trial court rendered judgment for the plaintiff on the verdict of the jury for \$73.67 damages and \$50 attorney's fee. The trial court thereafter set said judgment aside and rendered judgment on the verdict of the jury in favor of the plaintiff for \$85.77 damages, and for an attorney's fee of \$50, being a total judgment for plaintiff in the sum of \$135.77.

From this judgment the defendant appeals, and asks a reversal for alleged errors of the trial court, which, for the purpose of discussion and determination, may be resolved into three propositions, viz.: (1) That the verdict of the jury is not sustained by sufficient evidence. (2) That, if plaintiff was entitled to recover at all, he was only entitled to recover the liquidated damages provided for by sections 6018, 6019, Rev. St. 1913, commonly known as the "speed statute;" that said statute affords the exclusive measure of recovery in actions for damages resulting from delay in transit to car-load shipments of live stock, and supersedes the measure of recovery which was available at common law. (3) That the assessment of an attorney's fee as a part of the judgment against the defendant, under the provisions of section 6063, Rev. St. 1913, deprives the defendant of the due process of the law and of the equal protection of the law, guaranteed by the fourteenth amendment to the Constitution of the United States; and that, inasmuch as the case at bar was conducted in the courts by an attorney who was not employed by the plaintiff, but was furnished by an association or collection agency which had undertaken for profit to collect plaintiff's claim against the defendant, to assess a statutory at-

torney's fee in favor of such client, for the benefit of such association or such attorney so acting, is in violation of public policy.

It appears from the evidence that the plaintiff, pursuant to the orders of defendant's agent at Tyson, had his stock loaded in the car and ready for transportation at 12 o'clock, midnight, on the 3d day of January, 1912; that the defendant's train which conveyed said stock to South Omaha did not arrive at Tyson until 2:30 o'clock A. M. on January 4; that the train made several long stops at various stations between Tyson and South Omaha; that the crew in charge of the train appeared to be working with the hose connected with the air brakes, sometimes when the train was stopped, and at other times appeared to be doing nothing and making no effort to move the train. The train consisted of 2 engines and about 28 cars. By reason of defendant's unreasonable delay in starting plaintiff's shipment of cattle from Tyson, and the further unreasonable delay in transit, the plaintiff suffered material and substantial damages. The verdict and judgment for damages, except as to the amount for which plaintiff filed a remittitur, is amply sustained by the evidence. "In a law action, where the evidence upon any disputed question of fact is sufficient to sustain a finding either way, the finding of the trial court thereon will be sustained on appeal." *Holmvig v. Dakota County*, 90 Neb. 576. *Dorington v. Soules*, 90 Neb. 587.

As to the defendant's second proposition, the plaintiff contends that, if the shipper's common law right of action is held to be abrogated by the "speed statute," then that statute must be held to be unconstitutional, as being in violation of section 4, art. XI of the Constitution, which provides that "the liability of railroad corporations as common carriers shall never be limited." Sections 6018, 6019, Rev. St. 1913, known as the "speed statute," are as follows:

"6018. It is hereby declared and made the duty of each corporation, individual or association of individuals, operating any railroad as a public carrier of freight in the state of Nebraska, in transporting live stock from one point to another in the state in car-load lots, in consideration of the freight charges paid therefor, to run their train conveying the same at a rate of speed so that the time consumed in the journey from the initial point of receiving such stock to the point of feeding or destination, shall not exceed one hour for each eighteen miles traveled, including the time of stops at stations or other points: Provided, in cases where the initial point is not a division station, and on all branch lines not exceeding one hundred and twenty-five miles in length, the rate of speed shall be such that not more than one hour shall be consumed in traversing each fourteen miles of the distance, including the time of stops at stations or other points, from the initial point to first division station or over such branches. The time consumed in picking up and setting out, loading or unloading stock at stations shall not be included in the time required, as provided in this schedule: Provided, further, upon branch lines not exceeding one hundred and twenty-five miles in length, live stock of less than six cars in one consignment, each railroad company in this state may select and designate three days in each week as stock shipping days, and publish and make public the days so designated, and, after giving ten days' notice of the days so selected and designated, shall be required upon its branch lines to conform to the schedule in this section provided only upon the days so designated as stock shipping days.

"6019. Any individual, corporation or association of individuals violating any provisions of the next preceding section shall pay to the owner of such live stock the sum of ten dollars for each hour for each car it extends or prolongs the time of transportation beyond the

period herein limited as liquidated damages to be recovered as other debts are recovered."

In the case of *Cram v. Chicago, B. & Q. R. Co.*, 84 Neb. 607, in considering the constitutionality of the "speed statute," this court held as follows: "Section 4, art. XI of the Constitution, does not prohibit the legislature from increasing the common law liability of common carriers, and, in case the legislature expands such liability, the courts will not declare the statute void on the complaint of the carrier, because in some hypothetical case the law, if applied, might work to the disadvantage of a shipper."

In the *Cram* case, *supra*, this court regarded the "speed statute" as an increase of the common law liability of railroad corporations as common carriers, and therefore not in conflict with the provision of the Constitution which prohibits the limitation of such liability, and with that reasoning we are now in accord. The speed statute provides an additional remedy by which the shipper may recover liquidated damages in event that the common carrier fails to run its train conveying such shipper's live stock, from the initial point of receiving such live stock to the point of feeding or destination, at the average rate of speed provided by the statute. This statute affords a remedy by which the shipper may recover only for damages sustained by reason of delay in the transportation of the live stock from the point of shipment to the place of feeding or destination, after the train commenced to move on the journey. Damages so sustained are always difficult to prove, and are often not susceptible of proof. Yet there is always some damage due to such delay in transit, and the legislature, by the enactment of the "speed statute," without limiting the common law liability of railroads as common carriers, has provided a means by which such damages are liquidated, and may be recovered without other or further proof as to amount, except proof of the failure of the carrier to move the shipment at the

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average rate of speed required by the statute. The "speed statute" does not provide for the recovery of damages sustained by reason of delay of the carrier in starting the shipment to move after it has been received by it; for loss of, or injury to, the live stock by reason of want of due care, or by violence on the journey. For damages sustained from such causes, and from all causes, including the unnecessary delay defined by the "speed statute," the shipper still has his common law remedy. If all of the damages sustained are caused by the unreasonable delay in transit defined by the "speed statute," the shipper may, at his election, bring his action either under the statute for the liquidated damages fixed by the "speed statute," or under the common law for the actual damages sustained. "In construing an act of the legislature all reasonable doubts must be resolved in favor of its constitutionality." *State v. Standard Oil Co.*, 61 Neb. 28. In the case at bar a part of the damages sustained by the plaintiff was due to the unreasonable delay of the defendant in starting the shipment to move on its journey after it had been received by the defendant. The plaintiff, in conformity with the order of defendant's agent, had his live stock loaded on the car at midnight, and the defendant's train did not arrive and start the shipment to move on its journey until 2:30 o'clock in the morning. The plaintiff elected to bring his action under the common law for all damages sustained by him, and he recovered only for the actual damages proved.

For its third proposition the defendant contends that the trial court erred in assessing an attorney's fee for plaintiff's attorney, under the provisions of section 6063, Rev. St. 1913, which is as follows:

"6063. Every claim for loss or damage to property in any manner, or overcharge for freight for which any common carrier in the state of Nebraska may be liable, shall be adjusted and paid by the common carrier delivering such freight at the place of destination within

sixty days, in cases of shipment or shipments wholly within the state, and within ninety days in cases of shipment or shipments between points without and points within the state, after such claim, stating the amount and nature thereof accompanied by the bill of lading or duplicate bill of lading or shipping receipt showing amount paid for or on account of said shipment, which shall be returned to the complainant when the claim is rejected or the time limit has expired, shall have been filed with the agent, or the common carrier at the point of destination of such shipment, or at the point where damages in any other manner may be caused by any common carrier. In the event such claim, which shall have been filed as above provided within ninety days from the date of the delivery of the freight in regard to which damages are claimed, is not adjusted and paid within the time herein limited, such common carrier shall be liable for interest thereon at seven per cent. per annum from the date of the filing of such claim, and shall also be liable for a reasonable attorney's fee to be fixed by the court, all to be recovered by the consignee or consignor, or real party in interest, in any court of competent jurisdiction: Provided, in bringing suit for the recovery of any claim for loss or damage as herein provided, if the consignee or consignor, or real party in interest, shall fail to recover a judgment in excess of the amount that may have been tendered in an offer of settlement of such claim by the common carrier liable hereunder, then such consignee or consignor, or real party in interest, shall not recover the interest penalty or attorney's fees herein provided."

The defendant contends that due process of law and the equal protection of the law guaranteed by the fourteenth amendment of the Constitution of the United States are both denied to the defendant by this statute. The constitutionality of similar statutes of other states has been passed on by the supreme court of the United States. In the case of *Gulf, C. & S. F. R. Co. v. Ellis*,

165 U. S. 150, a statute of the state of Texas providing that an attorney's fee of \$10 should be recovered in actions on claims against railway companies for personal services rendered or labor done, or for damages, etc., was held to be invalid and in conflict with the due process and equal protection provisions of the Constitution of the United States, for the reason that the Texas statute singles railway companies out of all citizens and corporations, and requires them to pay in certain cases attorney's fees to the parties successfully suing them, while it gives to them no like or corresponding benefit. In the case of *Missouri, K. & T. R. Co. v. Cade*, 233 U. S. 642, a later statute of Texas providing for the recovery of attorney's fees in actions on certain kinds of claims, against any person or corporation doing business in the state, was held to be valid, for the reason that the statute did not single out a particular class of debtors, and applied only to certain kinds of claims. In the case of *Yazoo & M. V. R. Co. v. Jackson Vinegar Co.*, 226 U. S. 217, a statute of Mississippi providing for the recovery of a penalty of \$25 in addition to the amount of the claim in actions on claims against common carriers amounting to \$200 or less, not settled by the carrier within the time limited by statute, was held to be valid, for the reason that it applied to all common carriers, whether persons or corporations, and because the statute was applicable only to a certain class of claims admitting of special legislative treatment. Section 6063, Rev. St. 1913, applies to all common carriers in the state of Nebraska, whether persons or corporations. It is not open to the objection that it singles out a certain class of debtors and imposes upon them burdens not imposed upon other debtors engaged in the same kind of business. This statute provides for the recovery of a reasonable attorney's fee, to be fixed by the court, in actions on a certain kind of claims, viz., claims for loss or damages to property in any manner, or overcharge for freight. It was not the intention of the legislature to

make this act applicable to claims for the loss or damage to all property, including property upon or adjacent to a railroad, but only to property received by the carrier as freight for transportation. This is made clear by the requirements of the act that all claims must be accompanied by the bill of lading or duplicate bill of lading or shipping receipt, when returned to the complainant by the carrier, upon the rejection of such claims. Individual claims against common carriers for loss or damage to shipments of freight and for overcharges for freight are in most cases so small that the consignor could not afford to litigate such claims if he were compelled to pay attorney's fees. To remedy this wrong which the shipper might otherwise be required to suffer without redress, it is within the power of the legislature to provide for the recovery by the shipper of a reasonable attorney's fee in a successful action, upon a claim within the class comprehended by the act referred to. This act being applicable to all persons and corporations engaged in the business of common carriers in the state, and applying only to a certain class or kind of claims admitting of special legislative treatment, is valid, and not repugnant to the due process of law and equal protection of the law provisions of the fourteenth amendment to the Constitution of the United States.

As to the defendant's contention that an attorney's fee should not have been assessed, for the further reason that the plaintiff placed his claim for collection in the hands of an association organized for profit, that the suit was brought through the attorney for the association, and that said association is therefore engaged in the unlawful practice of the law, and the allowance of an attorney's fee in such case is against public policy, we will agree with the defendant that cases might arise wherein it would be against public policy to permit the recovery of an attorney's fee by such an association. In the case at bar, however, it appears that the attorney for whose benefit the attorney's fee was assessed

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was the attorney of record for the plaintiff, and conducted the case for him in the trial court. We think the attorney's fee was properly assessed for the benefit of plaintiff's attorney of record, in payment for legal services rendered by him. The judgment of the district court should be affirmed.

For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and the foregoing opinion is adopted by and made the opinion of the court.

AFFIRMED.

ALLIE L. PERRY, APPELLEE, v. OMAHA ELECTRIC LIGHT & POWER COMPANY, APPELLANT.

FILED APRIL 29, 1916. No. 18840.

1. **Release: AVOIDANCE: FRAUD: BURDEN OF PROOF.** When the plaintiff in a suit for personal injuries has executed a release in writing of all claims for damages from the defendant, and has received a consideration therefor, but seeks to avoid the release on the ground that it was obtained by fraud or deception practiced upon him by the defendant, and that at the time the release was executed his mental condition was such that he was incapable of understanding the nature and quality of the act performed, or of comprehending its consequences, the burden is upon him to prove these facts.
2. **Compromise and Settlement: FRAUD: EVIDENCE.** When the amount received in settlement is grossly inadequate to compensate for the injuries sustained, that fact may be considered, with other evidence, as tending to show unfair practice, that the party has been overreached, and that the minds of the parties never met in the consummation of a valid contract.

APPEAL from the district court for Douglas county:
CHARLES LESLIE, JUDGE. *Affirmed.*

Crofoot, Scott & Fraser, for appellant.

Lambert, Shotwell & Shotwell, contra.

MORRISSEY, C. J.

This is an appeal from the district court for Douglas county in an action wherein the plaintiff recovered a judgment for \$2,000 for personal injuries sustained while in defendant's employ. While in the discharge of his duties as an arc light inspector, owing to the defective construction of defendant's lines and its failure to keep its wires properly insulated, plaintiff received an electric shock which threw him from the pole where he was working to the pavement below. He sustained a fracture at the base of the skull and was otherwise injured.

The answer contained a general denial; alleged contributory negligence on the part of plaintiff; that he was familiar with the dangers incident to his employment, and had assumed the risks incident thereto; and further alleged that at a time subsequent to the injuries the plaintiff had made a full and complete settlement with the defendant covering all damages he had sustained, and that plaintiff had executed the following release in writing:

"Oct. 14, 1912.

"Received from Omaha Electric Light & Power Co. the sum of ninety seven dollars (\$97.50) which I (being of lawful age) acknowledge to be in full accord, satisfaction and compromise of a disputed claim growing out of a bodily injury sustained by me on or about August 27, 1912, for which bodily injury I have claimed the said Omaha Electric Light & Power Co. to be legally liable, and in consideration of said sum so paid I hereby remise, release and forever discharge the said Omaha Electric Light & Power Co., its successors, administrators, and assigns from any and all actions, causes of actions, claims and demands, for, upon, or by reason of, any damage, loss, injury or suffering which heretofore has been, or which hereafter may be, sustained by me in consequence of such accident and injury.

"Witness my hand and seal the day and date first above written.

A. L. Perry.

"Witness: Fred Dickinson."

Plaintiff in reply pleaded that this release was given simply as a receipt for wages due, but that no part of the sum received was in payment for, or in release of, damages sustained by reason of the injuries. He also pleaded that the release was obtained by fraud and deceit; that plaintiff never executed, or intended to execute, a release for the damages he had sustained; that when defendant paid plaintiff the sum set out in the release, and when plaintiff signed the release, defendant represented that it was only a receipt for wages. He also alleged that the release was executed at a time when he was sick and in an enfeebled condition of body and mind due to the shock and injuries he had received, and that he was then suffering from severe headaches and loss of memory and was unable to transact matters of business; that he was then so weak and distressed in mind that he was unable to properly care for himself; that he did not read the release, but relied upon the representations of the defendant; that he believed it was a receipt for wages and nothing more; and that these facts were well known to the defendant and its agents at the time the release was executed.

At the close of plaintiff's case defendant moved for a directed verdict, based solely on the ground that plaintiff could not recover owing to the execution of this release. At the close of defendant's case the same motion was renewed, and, although five assignments of error are made in the brief, appellant's main contention is based upon the proposition that the settlement and release were and are binding on plaintiff, and that he is not entitled to recover in the face of this release.

The first proposition of law advanced by appellant is: "A party who, having the capacity and opportunity to read a release of claims for damages for personal injuries signed by himself, and not being prevented by fraud practiced upon him from so reading it, failed to do so, and relied upon what the other party said about it, is estopped by his own negligence from claiming that the release is not legal and binding upon him according to its terms." It has been so

held in *Osborne v. Missouri P. R. Co.*, 71 Neb. 180. But in this case the jury were instructed that plaintiff could not recover unless they found from a preponderance of the evidence that the release was obtained through some fraud or deception practiced upon him by the defendant or its agents, or that at the time he executed the release his mental condition was such that he could not understand the meaning or purpose of the same. By their verdict they resolved these questions in favor of the plaintiff. As we view the record, the first question to determine is whether the evidence is sufficient to sustain this finding. There is a conflict in the evidence as to the understanding of the parties at the time the release was executed, and this evidence must be considered in the light of all the surrounding circumstances. Plaintiff was a young man of about 23 years of age, and is not shown to have had any business experience. He had suffered a severe shock, necessitating his confinement in a hospital, where he lay in an unconscious condition for a number of days, but had sufficiently recovered to be up and about, and ready to resume work. He testifies, however, that, following the injury, he was nervous, suffered with headaches and with dizziness. Defendant proved that while in the hospital plaintiff was discovered to be suffering from a venereal disease. The medical testimony shows that the troubles of which the plaintiff complained, and from which he claimed to be suffering at the time of the trial, might be due to this disease, and defendant seeks to shift responsibility for his condition on the theory that it was not brought about because of the injuries sustained in its employ, but because of this disease, which is said to be progressive in its nature.

Following the execution of the release, plaintiff resumed work for the company and remained in its employ for several months. He left Omaha in March 1913, but returned in December following, and again made application to defendant for work. The foreman to whom he applied promised him employment, but within a short time thereafter notified him that the company did not desire to secure

his services. Soon thereafter this suit was instituted. It quite clearly appears that plaintiff was incapacitated for work; his injuries were serious; and the amount of recovery is not excessive. It is well to consider the extent of his injuries in concluding whether he meant to make a settlement of his claims therefor when he signed the receipt which is offered in evidence. The fact that he was paid but \$97.50 and that the verdict of the jury is for \$2,000, and that no complaint of the amount is made, may be taken into account in determining the condition of his mind, his ability to transact business, and his ability to understand the meaning or purpose of the paper at the time of its execution. If he could not understand its meaning or purpose, or if his mental condition was such that he was unable to comprehend its effect, he cannot be held to be bound by this release. On the other hand, the fact that he remained in the employ of the company for a number of months, left the city, and, after an absence of several months, returned again and sought employment may be said to indicate that, in signing the release and accepting the amount paid at that time, he intended to release defendant.

In *Hauber v. Leibold*, 76 Neb. 706, it is held: "In order to make a valid contract the minds of the parties must meet; and if one mind is so weak, unsound or diseased that the party is incapable of understanding the nature and quality of the act to be performed, or its consequences, he is incompetent to make a valid contract, whether such state of his mind be the result of sickness, accident or voluntary intoxication."

If his mind was in such condition that he could not make a valid contract, it matters not, so far as the release is concerned, whether that condition of mind was brought about by reason of the shock from the fracture of his skull or from the disease with which he is shown to have been afflicted.

Where the amount received in settlement is grossly inadequate to the injuries suffered, that fact may be con-

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sidered as tending to show unfair practice; that the party has been overreached, and that the minds of the parties never met in the consummation of a valid contract.

Defendant states in its main brief that in this appeal it "has devoted its attention solely to the defense of a settlement and release having been made." However, we find that complaint is made of instructions. The court instructed the jury that the release was binding on the plaintiff, unless he had established by a preponderance of the testimony that it was obtained through fraud or deception practiced upon him, or at the time of its execution plaintiff's mental condition was such that he could not understand its meaning or purpose. We find no error in this instruction.

The judgment is

AFFIRMED.

SEDGWICK, J., not sitting.

GEORGE E. DOVEY, ADMINISTRATOR, ET AL., APPELLANTS, V.
FRANK E. SCHLATER, SPECIAL ADMINISTRATOR,
ET AL., APPELLEES.

FILED APRIL 29, 1916. No. 19475.

1. **Executors and Administrators: VOID JUDGMENT: RELIEF IN EQUITY.** One whose individual property and the partnership property in which he has an interest is seized under an execution issued on a void judgment against him in his capacity as the administrator of the estate of a deceased person may maintain a suit in equity to enjoin the sheriff, and those who obtained the judgment, from attempting to subject such property to the satisfaction of such void judgment.
2. ———: ———: ———: **SUFFICIENCY OF PETITION.** The substance of plaintiff's petition set out in the opinion, and *held* sufficient to entitle him to equitable relief.

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APPEAL from the district court for Cass county: JAMES T. BEGLEY, JUDGE. *Reversed.*

John L. Webster and D. O. Dwyer, for appellants.

J. J. Sullivan, C. A. Rawls, A. L. Tidd and F. A. Brogan, *contra.*

BARNES, J.

This is an appeal from a judgment of the district court for Cass county sustaining a demurrer to plaintiffs' bill in equity, by which it was sought to establish the interest of defendants' decedent in certain property, and to enjoin the levy and collection of an alleged judgment of the county court of that county, and dismissing the action.

It was averred in the petition that plaintiff, George E. Dovey, was the administrator of the estate of his father, E. G. Dovey, who departed this life in the year 1881; that deceased left surviving him his widow, Jane A. Dovey, and his sons, Horatio N. Dovey, Oliver C. Dovey, and the plaintiff, George E. Dovey; that Jane A. Dovey departed this life in the year 1913, and that Frank E. Schlater was appointed special administrator of her estate; that, upon a petition to the county court by said Schlater, the plaintiff, George E. Dovey, was cited to appear and render his account as administrator of the estate of his father, E. G. Dovey; that he rendered a true and correct account of his administration of the estate of the deceased; that his account was wrongfully disallowed, and he was surcharged by the court with the amounts alleged by Schlater to be due the estate of Jane A. Dovey; that a judgment was rendered against the plaintiff, George E. Dovey, as administrator of his father's estate, for the sum of \$54,297.64, and in favor of the estate of his mother, Jane A. Dovey; that such judgment was rendered without any order of distribution ever having been made; that the other heirs of the estate of E. G. Dovey were never cited to appear, and were not parties to the proceeding; that the alleged judgment was filed in the office of the clerk of the district court for

Cass county, and the execution in question in this case was issued by the clerk against the plaintiff, George E. Dovey, as upon a personal judgment for that amount; that the sheriff of Cass county had pretended to levy the execution on 371 shares of bank stock owned by the firm of E. G. Dovey & Son, which was deposited as collateral with the Omaha National Bank; that the sheriff pretended to levy the execution on certain shares of bank stock which were owned by the plaintiff, and proceeded to levy on the goods and merchandise contained in the general store of the partnership of E. G. Dovey & Son, and the store building in which the stock of merchandise was contained and in which the partnership business was being conducted; that said execution was being levied on said property as the personal and individual property of the plaintiff, George E. Dovey; that the sheriff was about to sell the property so levied upon, notwithstanding the fact that plaintiff, George E. Dovey, had appealed from said void judgment to the district court for Cass county. It was further alleged that the district court had wrongfully dismissed George E. Dovey's appeal, for the sole reason that he had been unable to furnish a bond for such appeal. The petition further set forth, in substance, the following facts: At the time of the death of E. G. Dovey, he and the plaintiff, George E. Dovey, were equal partners conducting a copartnership business in the town of Plattsmouth, in Cass county, Nebraska, which business consisted of a general merchandise business then being carried on by them under the firm name of E. G. Dovey & Son; that as a part of the copartnership business they owned certain bank stock in the First National Bank of Plattsmouth, Nebraska, and other property, real and personal, constituting a part of the said partnership business; that at the time of the death of E. G. Dovey the partnership business was of the aggregate value of \$52,092.42, and upon his death the value of the interest of the plaintiff, George E. Dovey, of Horatio N. Dovey, Oliver C. Dovey and Jane A. Dovey, became and was as

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follows: The plaintiff, George E. Dovey, was the owner of an undivided one-half interest in the partnership of E. G. Dovey & Son, of the value of \$26,046.21. Plaintiff, George E. Dovey, as the heir of E. G. Dovey, was entitled to a portion of the estate of his deceased father, amounting to \$6,511.55; Horatio N. Dovey, as heir, was entitled to \$6,511.55; Oliver C. Dovey, as heir, was entitled to \$6,511.55; and Jane A. Dovey, the widow, was entitled to \$6,511.55, making a total of \$52,092.42. That, in addition to the foregoing partnership property, E. G. Dovey owned, in his own right, certain real estate in Cass county, Nebraska, and other choses of action; that after the death of E. G. Dovey the business theretofore carried on under the partnership name of E. G. Dovey & Son continued to be carried on in the same manner and under the same name, and the interest of the several parties as aforesaid in the said business remained invested therein; that afterwards, in 1895, it was claimed by Oliver C. Dovey and Horatio N. Dovey, defendants herein, that a mutual understanding or agreement was reached by which they became equal partners with the plaintiff, George E. Dovey, in the said business of E. G. Dovey & Son; that thereafter the business was carried on in the same manner, and that Horatio N. Dovey and Oliver C. Dovey each claimed to be entitled to an undivided one-third interest in the assets and profits of said business; nevertheless the business was continued and conducted under the name and style of E. G. Dovey & Son, and the three brothers contributed thereto in a greater or less degree, until September, 1909, when Oliver C. Dovey withdrew therefrom; that during all of the period from the time of the death of E. G. Dovey, in 1881, down to September 22, 1909, a period of 28 years, Jane A. Dovey, the widow and mother of the three boys, George, Oliver, and Horatio, permitted her interest in the said business of E. G. Dovey & Son to remain therein and to be used by the said brothers in the business of E. G. Dovey & Son to all intents and purposes as if the interest of Jane A. Dovey therein constituted a part of the assets of E. G. Dovey &

Son, and the business was conducted without any opposition on the part of Jane A. Dovey during all of said 28 years; that she knew that her interest in said business was so used as a part of the assets therein, and consented and acquiesced therein and thereto during the said 28 years, and from time to time drew therefrom such sums of money as she needed for her personal living and expenses, and that at no time during the said 28 years did the said Jane A. Dovey make any claim or assert any right to the withdrawal of her interest in the said business, or make any claim or assert any right that her interest was being in any manner converted or misappropriated by either of the three brothers, George, Horatio, or Oliver; that during the said period of 28 years rents collected and received from lands, the title to which had been in Edward G. Dovey, were placed in said business under the firm name of E. G. Dovey & Son, and when any part of said lands were sold the said Jane A. Dovey joined in the execution of the deeds or conveyances, and the proceeds of such sales were placed in the business of E. G. Dovey & Son as fully and effectually, and to all intents and purposes, as if the same belonged to the business of E. G. Dovey & Son, all of which was done with the full knowledge and acquiescence of the said Jane A. Dovey; that during all of said period of 28 years it was never claimed by Jane A. Dovey, or any other person in interest, that George E. Dovey had received said rents or choses in action or proceeds of sales of real estate in the capacity of administrator of the estate of E. G. Dovey, nor that he had received, handled, retained, or otherwise used any of the said rents, choses in action or proceeds of the sales of real estate as such administrator; but, to the contrary, all of said parties in interest, including the said Jane A. Dovey, recognized, consented to, and acquiesced in the receiving of said rents, choses in action and proceeds, and that the same became a part of the assets and business of E. G. Dovey & Son by the full consent and acquiescence of all the parties in interest, including the said Jane A. Dovey. It was further alleged that in September,

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1909, the net value of the business of E. G. Dovey & Son, including the interest of Jane A. Dovey, was \$142,796.56; that at that time Oliver C. Dovey withdrew from the business of E. G. Dovey & Son, and demanded of the plaintiff, George E. Dovey, and of Horatio N. Dovey, that they pay him, Oliver C. Dovey, for his undivided one-third interest of the business, the sum of \$50,000; that in pursuance of his demand the plaintiff, George E. Dovey, and Horatio N. Dovey paid to Oliver C. Dovey the sum of \$7,500 in money and gave him their promissory notes in the amount of \$42,500, secured by mortgage upon certain real estate in which they separately had an interest as heirs of E. G. Dovey, deceased; that, thereupon, Oliver C. Dovey released, quit-claimed and surrendered to E. G. Dovey & Son all his right, title, claim or interest in the said business, and the said division of the assets of the business of E. G. Dovey & Son was submitted to Jane A. Dovey, the widow, for her consent, approval and acquiescence therein; that the proceeding was fully explained to Jane A. Dovey, and she then and there agreed and assented to and approved of the said settlement and division of the assets of E. G. Dovey & Son, and then and thereby released any and all interest of every kind and nature which she had in the moneys invested in the said business of E. G. Dovey & Son; that it was then agreed, among other things, that the said three brothers should thereafter contribute to the support of Jane A. Dovey the following sums of money, annually: George E. Dovey, \$500; Oliver C. Dovey, \$500; Horatio N. Dovey, \$400; and that thereafter the said Jane A. Dovey should continue to reside at the home of Horatio N. Dovey. It was further stated that from and after September, 1909, up to the time of the death of Jane A. Dovey, in 1913, she continued to acquiesce in the division which had theretofore been made of the business of E. G. Dovey & Son, and by reason of the premises aforesaid the said Jane A. Dovey became, was, and is estopped, both in law and in equity, from asserting any right to any interest in the business of E. G. Dovey & Son, and from making any claim on her

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part to any interest in the said business; that she thereby became barred during her lifetime from claiming or asserting any interest in said business, revenues, rents, choses in action or proceeds of the sales of any part of said estate by way of dower right or otherwise, and that the estoppel applies to Frank E. Schlater, special administrator, above referred to; that Jane A. Dovey died on November 20, 1913, leaving a will, theretofore executed, by which she bequeathed and devised all her property of every kind and nature, without describing the same, to Edward Grovenor Dovey and George Oliver Dovey, sons of Horatio N. Dovey; that said will was and still is being contested in the courts, and its validity has not yet been finally determined. It is further alleged that when Frank E. Schlater, special administrator of the estate of Jane A. Dovey, filed his petition praying that the plaintiff herein, George E. Dovey, should file his account as administrator of the estate of his father, E. G. Dovey, he well knew all of the facts hereinbefore referred to, and was induced to file said petition in the interest of Edward Grovenor Dovey and George Oliver Dovey, and not otherwise. The petition also contained the report of the plaintiff, George E. Dovey, specified and itemized in full and verified as provided by law. It was alleged that, when said report was filed, Frank E. Schlater, as special administrator, filed exceptions thereto; that, when said report came on for hearing in the county court, the county judge rendered his judgment and finding therein against the plaintiff, George E. Dovey, as administrator of the estate of E. G. Dovey, in the sum of \$54,297.64 in favor of the estate of Jane A. Dovey. The petition further alleged that the application of Frank E. Schlater contained no prayer for a judgment against the plaintiff, George E. Dovey; that none of the other parties interested in the estate of E. G. Dovey were cited to appear; that no order of distribution was ever made and no account of the interests of the several heirs of the estate of E. G. Dovey was ever rendered, and that without any further order, notice or proceeding whatsoever the county court rendered the

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judgment aforesaid against this plaintiff, George E. Dovey; that said judgment was filed at the request of Frank E. Schlater in the district court for Cass county, and the execution above referred to was issued and placed in the hands of the sheriff of that county, who proceeded in the manner above stated. The petition also contained the allegation that plaintiff, George E. Dovey, was without any adequate remedy at law, and concluded with a prayer for equitable relief.

The petition and proceedings cover some 75 pages of printed matter, but we have only stated the substance of some of the allegations in order to show the nature of the action.

The record discloses that Oliver C. Dovey demurred to the petition for the reason that the facts alleged therein do not constitute a cause of action against him or entitle the plaintiff, George E. Dovey, to any relief. Defendant Frank E. Schlater filed an extended answer to the petition. The defendant Horatio N. Dovey also answered to the merits, and prayed that the petition of plaintiff, George E. Dovey, be denied, and to these answers said plaintiff replied. When the petition was filed the court issued a restraining order. The cause came on for hearing, and the district court sustained the demurrer of Oliver C. Dovey, and without taking any evidence, and without any further trial or hearing, held that the facts stated in the petition did not entitle the plaintiff, George E. Dovey, to any relief, and the action was dismissed.

When the appeal was lodged in this court, plaintiff George E. Dovey made application for a restraining order, which was allowed. Thereafter the defendant Schlater moved to vacate the order, and the ruling on the motion was continued to the time of final hearing.

As we view the record, the petition stated facts sufficient to constitute a cause of action and entitle the appellant to a trial of the case on its merits. This is an action wherein all the parties are brought before the court for the determination of their rights, and is the

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only one adequate to meet the situation. The county court had no jurisdiction to render the judgment appealed from.

If it should appear from the evidence that Jane A. Dovey retained her interest in the partnership property, and consented to the investment and use in the partnership business of her interest in the estate and property of E. G. Dovey, and drew money from the said business as an interested partner therein for many years, then her administrator would be estopped to deny those facts. The trial court should determine whether Jane A. Dovey in her lifetime made a settlement with the other parties interested in the business and transferred to them all of her interest in the business, as alleged in the petition. If it is found that no such agreement and transfer were made, then the trial court should determine the nature of the interest, if any, she had in the partnership and its value at the time of her decease, which should be decreed to her administrator for distribution under the order of the county court. If either of the partners in said business applies for that purpose, the partnership should be dissolved and the interest of each partner in the assets should be determined. The pleadings will be amended, if desired, and evidence taken.

We are of opinion that the judgment of the trial court should be reversed and the cause remanded for further proceedings, and that in the trial of the cause the litigation among all of the parties should be settled by giving to each his due, and making each of them respond to the full limits of their respective obligations.

The judgment of the district court is reversed and the cause is remanded for further proceedings, in accordance with the views above expressed.

REVERSED.

IN RE ESTATE OF EDWARD G. DOVEY.

GEORGE E. DOVEY, ADMINISTRATOR, APPELLANT, v. FRANK E. SCHLATER, SPECIAL ADMINISTRATOR, APPELLEE.

FILED APRIL 29, 1916. No. 19476.

Executors and Administrators: APPEAL: BOND. Where a judgment has been rendered by a county court against the administrator of the estate of a deceased person in his representative capacity, the administrator may appeal to the district court without an additional bond.

APPEAL from the district court for Cass county; JAMES T. BEGLEY, JUDGE. *Reversed, with directions.*

John L. Webster and D. O. Dwyer, for appellant.

C. A. Rawls and W. A. Robertson, contra.

BARNES, J. . . .

This is an appeal from a judgment of the district court for Cass county dismissing the appeal of George E. Dovey from a judgment for \$54,297.64 rendered against him as administrator of the estate of E. G. Dovey.

The district court dismissed the appeal of the administrator because he had failed to file an appeal bond. The record discloses that he was unable to furnish such a bond, and contended that, by reason of the fact that he had given a bond as such administrator, which had been duly approved by the court, he was not required to file an additional appeal bond, even if he had been able to furnish such bond. The record further discloses that E. G. Dovey departed this life in the year 1881; that he left surviving him, as his only heirs at law, George E. Dovey, Oliver C. Dovey and Horatio N. Dovey, together with his widow, Jane A. Dovey; that appellant, George E. Dovey, was appointed administrator of the estate of the decedent, gave his bond as such administrator and entered upon his duties; that Jane A. Dovey died on the 20th day

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of November, 1913, and that Frank E. Schlater was appointed special administrator of her estate.

After Schlater qualified as special administrator, he filed an application in the county court of Cass county to require George E. Dovey to render an account of his doings as administrator of the estate of his father. In answer to the citation issued by the county court, George E. Dovey appeared and filed his answer under oath as provided by law. The report also contained matters which required consideration by the county court. On the filing of the report and inventory, a citation was issued and published notifying all parties interested in the estate of the time fixed for the consideration of the report. The special administrator filed an answer and exceptions, and without further process or proceedings, and without any appearance of the other heirs of the estate of E. G. Dovey, the court took the matter under advisement, and on the 9th day of June, 1915, rendered the following judgment: "Wherefore it is ordered adjudged and decreed that the estate of Jane A. Dovey, deceased, through the special administrator, Frank E. Schlater, have and recover from George E. Dovey, as administrator of the estate of Edward G. Dovey, deceased, the sum of \$54,297.64, together with costs of suit, and that execution be, and the same is hereby, awarded for said amount and costs." From that judgment George E. Dovey prosecuted an appeal to the district court, alleging and showing by affidavit that he was unable to secure an appeal bond. It appears from the record that no pleadings were ever filed in the county court praying for or even suggesting that a judgment be rendered against George E. Dovey as an individual. No order of distribution was ever made. Neither were the amounts due each of the heirs ever determined, and nothing was done giving said heirs or the special administrator of the estate of Jane A. Dovey the right to recover their several shares from the said George E. Dovey. It is contended that the county court was without jurisdiction

to render such a judgment. Section 1427, Rev. St. 1913, provides: "Every executor or administrator who may have given bond in this state, with surety as provided by law, shall be authorized in all cases of appeal from one court to another, by him made, to prosecute the same without filing an appeal bond, such appeal to be prosecuted to the district court as appeals are now taken from courts of justices of the peace."

The effect of this statute was stated in *Kerr v. Lowenstein*, 65 Neb. 43. In that case a suit was brought upon an appeal bond, and the sureties defended upon the sole ground that under the terms of the statute the administrator was not required to give the appeal bond, and therefore the bond was a nullity and no action could be maintained thereon. The adverse party stated that, notwithstanding the administrator might sue out an appeal without giving an appeal bond, such an appeal would not supersede the judgment. The court held: "We are unable to agree to this contention. The effect of such construction would be to render meaningless that portion of the section quoted which gives the administrator the right 'to prosecute the same without filing an appeal bond.' * * * If the legislature, by the language used, intended to say no more than that an administrator or executor should also enjoy this right, the section would be entirely useless. It is elementary in the construction of statutes that such construction is favored which gives to the entire enactment force and effect, if possible, and, adopting this rule, we are required to say that the language quoted was inserted for the purpose of taking administrators and executors, duly qualified and acting as such, who have given bond agreeably to law, out of the general rule requiring litigants to give bond in order to supersede judgments rendered against them from which they desire to appeal."

In the case at bar the administrator properly represented, not only himself and his own interest, but also the interests of Oliver C. Dovey and Horatio N. Dovey,

together with the other heirs of the estate of E. G. Dovey. It should be observed that the judgment ran against George E. Dovey as administrator, and that he appealed in that capacity, and not from a judgment or order against him personally. The interests thus represented by George E. Dovey gave him the right to appeal without bond. *In re Williams*, 97 Neb. 726; *Thompson v. Pope*, 77 Neb. 338; *Rhea v. Brown*, 4 Neb. (Unof.) 461. We are therefore of opinion that the district court erred in dismissing the appeal.

The judgment of the district court is reversed and the cause is remanded to that court, with directions to set aside the judgment of the county court, and remand the cause to that court, with directions to recall the execution to make a final accounting, settlement and order of distribution of the assets of the estate of E. G. Dovey, deceased, among those interested therein, and for such further proceedings as may be necessary in the premises, not in conflict with this opinion.

REVERSED.

EMIL BAUER V. STATE OF NEBRASKA.

FILED APRIL 29, 1916. No. 19492.

1. **Criminal Law: EMBEZZLEMENT BY AGENT: EVIDENCE OF DUTIES: ADMISSIBILITY.** In a prosecution for embezzlement of the moneys of a corporation by its agent and general manager, the secretary may testify as to the specific duties of the manager, where the duties of such manager are not fully set forth in the charter and by-laws of the corporation.
2. ———: ———: **BOOKS OF ACCOUNT: EXAMINATION: EVIDENCE AS TO RESULTS.** Where, in such a prosecution, it appears that the business of the corporation amounted to more than \$300,000 in a single year and consisted of many thousands of transactions with different individuals, an expert accountant who has examined the books of the corporation, as kept by the defendant, and which books were

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in court subject to defendant's inspection, and has compiled a financial statement of their contents, may testify as to the result of his examination.

3. **Embezzlement: VERDICT: SUFFICIENCY OF EVIDENCE.** Evidence examined, its substance set forth in the opinion, and *held* sufficient to sustain the verdict.
4. ———: **TRIAL: INSTRUCTIONS.** In such case it was not reversible error for the court to instruct the jury that as to the count charging the embezzlement of \$2,000 on or about March 9, 1915, it is not necessary for the state to prove the embezzlement of the whole of said amount, nor of any particular amount on any particular day, but "if you find from the evidence a continuous series of felonious conversions of money by the defendant at different times and in different amounts before that date and subsequent to January 1, 1914, and not included in any other count, you are entitled to consider the aggregate sum of such separate conversions of money by the defendant as the amount of embezzlement under this count; but not over the sum of \$2,000, which is the amount charged."
5. **Criminal Law: TRIAL: ADDITIONAL INSTRUCTIONS.** While the jury were deliberating on their verdict, they came into court and requested further instructions, and the same were given. The defendant, being present with his counsel in court, made no objection. The giving of the instructions did not constitute reversible error.
6. ———: ———: ———. In answer to a request by the jury for further instructions, the court gave the following in writing: "In your finding as to the value, the word 'about' does not conform to the statute. You may renew your deliberations, and, in case your verdict is guilty, you should find some definite amount, such sum as you are able to say beyond a reasonable doubt is the amount and value embezzled." The defendant and his counsel made no objection to this instruction, and the giving of it did not constitute reversible error.
7. ———: **EVIDENCE: ADMISSIBILITY: AVOIDANCE OF ARREST.** Evidence that the defendant left his employment and went to other states and cities with the view of avoiding arrest may be received, not as a confession of his guilt, but simply as a circumstance to be considered by the jury with all of the other evidence in arriving at their verdict.
8. **Statutes: REPEAL AND RE-ENACTMENT: EFFECT.** The rule seems to be settled in this state that the simultaneous repeal and re-enactment of a statute in terms, or in substance, is a mere affirmance of the

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original act, and not a repeal in the strict or constitutional sense of the term. *State v. Bemis*, 45 Neb. 724.

ERROR to the district court for Clay county: LESLIE G. HURD, JUDGE. *Affirmed.*

McCreary & Danley, Ambrose C. Epperson and George W. Miller, for plaintiff in error.

Willis E. Reed, Attorney General, Charles S. Roe and M. L. Corey, contra.

BARNES, J.

Emil Bauer was tried in the district court for Clay county on an information containing 13 counts charging him with the embezzlement of certain sums of money belonging to the Harvard Co-operative Grain & Live Stock Company, a corporation of which he had been the managing agent.

On the trial all of the counts of the information were eliminated except the first, second, fourth and thirteenth. The jury found Bauer not guilty as to the first, second and fourth counts, and guilty on the thirteenth count of said information, which charged him generally with the embezzlement of the sum of \$2,000 of the funds of the corporation on or about March 9, 1915. His motion for a new trial was overruled, and he was given an indeterminate sentence of from one to five years in the state penitentiary. To reverse that judgment, he has brought the case to this court by a petition in error. In this opinion he will be designated as the defendant.

Much reliance seems to have been placed on the assignment that the court erred in receiving the testimony of witness Dieringer, who was the secretary of the corporation. It appears from the record that defendant's powers and duties were set forth in the articles of incorporation and by-laws in the most general way, but his specific duties were to buy and sell grain, collect the money due the company, deposit it in the bank and check

it out, keeping a record of his transactions in triplicate on slips provided for that purpose, and from which slips the books of the corporation were kept and posted. The record discloses that the secretary had personal knowledge of the facts to which he testified, and which were in addition to those stated in the by-laws. The evidence was competent, and the objection that it was not the best evidence is without merit. The statement of the same witness as to the duties of Miss Ketchum, who was the bookkeeper, was also competent and not subject to the objection that it was not the best evidence.

Defendant's next contention on which he seems to place reliance was that the court erred in receiving the testimony of the expert accountant who examined the books of the company and compiled a statement therefrom. The statement was used to refresh his recollection in connection with the books themselves which were in court subject to the defendant's inspection. The record shows that the business of the company totaled over \$300,000 in a single year, and consisted of many thousand entries. Therefore it was practically impossible to trace each entry in the books and place the result thereof before the jury. In such a case an expert accountant may testify as to the results of his examination of the books and the accounts of the company. *Bartley v. State*, 53 Neb. 310; *Bode v. State*, 80 Neb. 74; *Mendel v. Boyd*, 71 Neb. 657. It is further contended that the witness had not complied with the provisions of section 5820-5825, Rev. St. 1913, and therefore his evidence was incompetent. The record shows that Mr. Thomas, who was the expert accountant, had served acceptably in that capacity for many years. He thoroughly qualified himself to testify and therefore this objection is without merit. We think what we have said as to the introduction of testimony is sufficient to dispose of all of such objections and assignments relied on by the defendant.

As to the question of the sufficiency of the evidence to sustain the verdict, the record shows beyond a reasonable

doubt that during the year 1914 and up to the 9th day of March, 1915, when defendant left his employment, he was short in his accounts with the company to the amount of \$6,430. The several items included in that amount were taken and used by the defendant from time to time during the period above mentioned. He was a witness in his own behalf and attempted an explanation of certain items found in his accounts. His explanations covered the items with which he was charged in the first, second and fourth counts of the information, together with some other items, amounting in all to \$1,043, or a total of \$1,373. Giving him full credit for this amount, the testimony shows that more than \$5,000 of the company's money was unaccounted for. It seems clear that at the date of the charge contained in the information on which he was convicted his shortage amounted to more than \$5,000, and we are of opinion that the evidence sustains the verdict.

The court instructed the jury: "In count number 13 of the information the state charges an embezzlement by the defendant of about the sum of \$2,000, on or about the 9th day of March, 1915. You are instructed as to this count that it is not necessary for the state to prove the embezzlement of the whole of said amount of \$2,000, nor of any particular amount on any particular day, but if you find from the evidence a continuous series of felonious conversions of money by the defendant at different times and in different amounts before that date and subsequent to January 1, 1914, and not included in any other count, you are entitled to consider the aggregate sum of such separate conversions of money by the defendant as the amount of embezzlement under this count; but not over the sum of \$2,000, which is the amount charged."

This instruction is assigned as error, and it seems to be the contention of the defendant that the several amounts of money taken and converted to his own use cannot be found and taken together for the purpose of

sustaining a conviction under the thirteenth count. We think that as to this assignment the defendant is mistaken. The rule announced in *Bolln v. State*, 51 Neb. 581, sustains such an instruction. In 9 R. C. L. p. 1299, it is said: "Proof that the money alleged to have been embezzled by an agent was received in several sums, at different times, and from different persons, during a course of continuous dealing between such agent and his principal, will support a verdict finding the aggregate sum as the amount of a single embezzlement." *State v. Moyer*, 58 W. Va. 146, 6 Am. & Eng. Ann. Cas. 344, is cited. We think this rule too well settled to be a subject for further discussion.

We have examined the other instructions given by the court and those requested by the defendant and refused, and find no reversible error.

The record further discloses that, while the jury were deliberating upon the verdict, they returned into court in charge of the officer and propounded the following question: "Did Miss Ketchum's white slips correspond with the bank slips?" The defendant was present with his counsel in court at that time, and the court, without any objection on his part, answered the interrogatory as follows: "I answer, 'My recollection of the evidence is that the white slips furnished her by Emil Bauer on the deposit slips of the bank correspond in amount or in case of mistake in figures were corrected and when corrected balanced \$.'" The bill of exceptions shows that Miss Ketchum so testified, and we are of opinion that it was not reversible error for the court to give the instruction to the jury of which defendant complains.

It also appears that the court instructed the jury during their deliberation as follows: "In your finding as to the value, the word 'about' does not conform to the statute. You may renew your deliberations, and, in case your verdict is guilty, you should find some definite amount, such sum as you are able to say beyond a reasonable doubt is the amount and value embezzled." This addi-

tional instruction was given in writing in open court in the presence of the defendant and his counsel without objection on his part. Under the rule announced in *Jame-son v. State*, 25 Neb. 185, it was not reversible error for the court to so instruct the jury.

It appears from the record that on or about the 8th day of March, 1915, the defendant, fearing trouble by reason of the condition of the affairs of the company, left his employment and fled from Harvard; that in about a month thereafter he returned and was arrested by the sheriff of Clay county. The sheriff was allowed to testify to that fact, and to further testify as to defendant's admissions that while he was absent from Harvard he went from place to place throughout several southern cities and states in an attempt to avoid arrest. The admission of this testimony is assigned as error. It appears, however, that it was received, not as a confession of defendant's guilt, but simply as a circumstance to be considered by the jury together with all of the other evidence in the case in arriving at their verdict. The testimony was competent. 8 R. C. L., p. 192; 12 Cyc. 395; *George v. State*, 61 Neb. 669.

Finally, it is contended that the Revised Statutes 1913, relating to embezzlement, having been repealed by an act of the legislature of 1915 (Laws 1915, ch. 157) entitled "An act to amend section 8649 of the Revised Statutes of Nebraska for 1913, relating to embezzlement, and to repeal said original section," there could be no prosecution under that section or under the section as amended by the act of 1915, for the reason that the acts constituting the crime as it stood prior to the amendment had been wiped out by the repeal, and the new act of 1915 amounts to an *ex post facto* law to punish for acts committed prior to the criminal statute defining the crime of embezzlement. If this contention should be sustained the defendant could not be punished for the series of conversions of money under his scheme to cheat and defraud

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the elevator company because of the failure of the legislature properly to protect pending prosecutions. The argument of defendant's counsel is based on the general rule that the repeal of the act defining a crime deprives the court of power to render a sentence upon a verdict finding defendant guilty. This contention disregards the situation in this case. There was no change whatever in the definition of the crime of embezzlement by the amendment of 1915. So far as this prosecution is concerned, the statute is the same, and the penalty imposed is absolutely unchanged. To quote the two statutes would render this opinion entirely too long. It is sufficient to say that the only change in the statute, so far as it affects the rights of the defendant, is that in the old statute the words "by virtue of such employment" are used, while in the statute as amended the following appears: "Which shall have come into his or her possession or care, in any manner whatsoever." The rule adopted in this state is that where a new act is in the very words of the statute which it repeals, and it is clear that the repeal and re-enactment were intended to continue in force the uninterrupted operation of the old statute, they will be so construed, and will apply to crimes committed before the new act took effect. *State v. Wish*, 15 Neb. 448; *State v. McColl*, 9 Neb. 203; *Wright v. Oakley*, 5 Met. (Mass.) 400; *Fullerton v. Spring*, 3 Wis. 677; *Hair v. State*, 16 Neb. 601; *State v. Bemis*, 45 Neb. 724; *Stenberg v. State*, 50 Neb. 127. The rule seems to be that the simultaneous repeal and re-enactment of the statute in terms, or in substance, is a mere affirmance of the original act, and not a repeal in the strict or constitutional sense of the term. We are therefore of opinion that this contention is without merit.

A careful examination of the record satisfies us that it contains no reversible error. The judgment of the district court is

AFFIRMED.

HAMER, J., not sitting.

**BESSIE JUCKETT ET AL., APPELLEES, V. SAM BRENNAMAN
ET AL., APPELLANTS.**

FILED APRIL 29, 1916. No. 18790.

1. **Venue: ACTION AGAINST SURETIES.** A surety upon a saloon-keeper's bond has such an interest in an action to recover civil damages brought against the saloon-keeper and his surety that an action may be brought against it in any county where it may be found. *Kramer v. Bankers Surety Co.*, 90 Neb. 301.
2. ———: **ACTION AGAINST FOREIGN CORPORATIONS.** A foreign corporation is "found," within the meaning of section 7619, Rev. St. 1913, in any county in which proper service can be had. *Council Bluffs Canning Co. v. Omaha Tinware Co.*, 49 Neb. 537.
3. **Process: SUMMONS: SERVICE ON INSURANCE COMPANY.** In an action against an incorporated insurance company in a county where there is an agency, the service may be upon the chief officer of such agency. Rev. St. 1913, sec. 7635.
4. **Intoxicating Liquors: LIABILITY OF SELLER.** "One selling intoxicating liquor is liable, not only for the actual results of the sale, but for all damages growing out of the disqualification resulting from or contributed to by such sale, without reference to the time through which such disqualification may continue." *Jessen v. Willhite*, 74 Neb. 608.
5. ———: **LIABILITY OF SELLER AND SURETIES.** A saloon-keeper and the sureties upon his bond are liable for the loss of support sustained by a widow and children of a decedent whose death was contributed to by intoxicating liquors bought from the saloon-keeper or drank by the deceased. *Schiek v. Sanders*, 53 Neb. 664.
6. ———: ———. Licensed liquor dealers in this state are liable in damages for all the legitimate and proximate consequences of their traffic, and, if they have induced drunkenness in a previously sober and industrious man who afterwards dies from exposure while in a condition of intoxication even after they have ceased to furnish him with liquors, they and their sureties may be liable to his widow and children for the damages they have suffered. *Stahnka v. Krettle*, 66 Neb. 829.
7. **Evidence: DECLARATIONS: ADMISSIBILITY.** Spontaneous and unpremeditated declarations as to pain or suffering made when the circumstances show the absence of design or motive on the part of the person making them are competent evidence of physical condition.
8. **Evidence examined, and held to support the verdict.**

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APPEAL from the district court for Madison county: ANSON A. WELCH, JUDGE. *Affirmed.*

Willis E. Reed, M. A. Hall and Cain & Mapes, for appellants.

Kelsey & Rice, contra.

LETTON, J.

This is an action by the widow of Delbert B. Juckett against a number of saloon-keepers and the sureties on their respective bonds to recover damages under the Slocum act. Plaintiff had judgment for \$17,000, and defendants appeal.

Ten of the defendants were licensed saloon-keepers in the city of Fremont during the license years of 1910, 1911 and 1912; another was in business at Cedar Bluffs during that time; while three of the defendants held licenses for the license year of 1913 in the towns of Royal, Brunswick, and Neligh, respectively, in Antelope county. The other defendants are sureties upon the bonds of these saloon-keepers.

It is alleged that in 1910 the deceased was a healthy, robust man; that the defendants, who were saloon-keepers in Fremont during part of 1910 and during the years of 1911, 1912, and part of 1913, sold liquors continuously and frequently to deceased, which he drank; that he was frequently drunk during this period in their saloons; that by such sales they caused him to form the habit of drinking to excess, and to become a drunkard, and by causing and contributing to his continual drunkenness they each caused him to become weakened and debauched in body and mind, his physical and vital force to become exhausted, and his ability to resist disease and exposure impaired and weakened, "and each of them thereby rendered the said Delbert B. Juckett an easy victim to disease, exposure and death." A like charge is made for the year 1913 against the other defendants, who were saloon-keepers in Antelope county.

It is next alleged that on December 26, 1913, deceased procured liquor from defendant Brennaman at Royal, Nebraska; that he started to go from Royal to his home in the country about ten miles away, about 6 o'clock in the evening, in an open wagon; that he had liquor with him which he had procured from Brennaman that day and which he drank on his way home; that he became intoxicated, lay down in his wagon, passed into a drunken slumber and paralyzed condition; that, the weather being cold, he was exposed to the cold in the wagon box for a number of hours, and died from the exposure, as a result of his intoxication and as a result of his weakened physical and mental condition.

Objections were filed by each of the saloon-keeper defendants to the jurisdiction of the court: "(1) Because he is not a resident of Madison county, Nebraska, nor was he served with a summons in the above entitled action in Madison county, Nebraska. (2) That the cause of action did not accrue in Madison county, Nebraska, nor was any one in said county upon whom legal service could be had or obtained when the petition was filed in said county." Each of these objections was overruled and separate answers were filed. The answers each admit that defendants were licensed saloon-keepers and sureties on their bonds as alleged, pleads they were not residents of Madison county and were not served with summons in that county, a misjoinder of causes of action, misjoinder of parties defendant, and a general denial.

The assignments of error are: "(1) The court had no jurisdiction of the persons of either of the defendants. (2) The verdict is contrary to law and is not supported by sufficient evidence. (3) Errors of law occurring at the trial. (4) The verdict is excessive and is the result of prejudice and passion."

1. A summons was issued to the sheriff of Madison county, which was returned showing personal service on the chief officer of the agency of the domestic surety com-

pany at its agency in Madison county, Nebraska. A like return was made as to service upon the chief officer of the agency of the foreign corporations. Section 7635, Rev. St. 1913, provides: "When the defendant is an incorporated insurance company, and the action is brought in a county in which there is an agency thereof, the service may be upon the chief officer of such agency." Section 7619, Rev. St. 1913, provides also that an action against "a foreign corporation may be brought in any county in which there may be property of, or debts owing to said defendant, or where said defendant *may be found*." Under these provisions service upon the "chief officer of such agency" in the county, of either a foreign or a domestic insurance corporation, is sufficient. The defendant is "found" in any county upon which proper service can be had upon its agent. *Council Bluffs Canning Co. v. Omaha Tinware Mfg. Co.*, 49 Neb. 537. The final proviso of section 7619, that if the "defendant be a foreign insurance company, the action may be brought in any county where the cause, or some part thereof, arose," is not a limitation, but an extension of jurisdiction, so that a recovery may be had in counties other than where the defendant is situated or may be found. These questions have already been settled by decisions of this court. *Western Travelers Accident Ass'n v. Taylor*, 62 Neb. 783; *Kramer v. Bankers Surety Co.*, 90 Neb. 301; *Horst v. Lewis*, 71 Neb. 365. The court, therefore, had jurisdiction to render the judgment complained of.

2. The assignment, "Errors of law occurring at the trial," has repeatedly been held too indefinite to warrant review by this court, but we will consider it. It is complained that Mrs. Juckett was permitted to testify to statements made by Juckett regarding his health and physical condition. It is often difficult to prove the condition of a person's health unless his own declarations under certain conditions are admitted in evidence. Spontaneous declarations made when there is no thought of any litigation or controversy, and when the circumstances

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tend to show the absence of any design or motive on the part of the declarant, are admissible. *Hewitt v. Eisenbart*, 36 Neb. 794. This is the general rule. 2 Jones, Commentaries on Evidence, sec. 349.

It is next argued that it was error to exclude an application made by Juckett for life insurance in May, 1913, and the written report made by the examining physician at that time. It was not proved that Juckett had read the statements written in the application by the doctor before he signed it. Moreover, the circumstances under which the statements were made were such as to induce in the appellant a desire to show a favorable state of health on his part. They were not made spontaneously and unpremeditatedly without any thought as to their possible effect upon the circumstances of the applicant. If a proper foundation had been laid, perhaps it would not have been erroneous to admit them, since such matters are largely in the discretion of the trial judge, but it was not erroneous to exclude them. So far as the report of the medical examiner is concerned, he was present at the trial and testified on behalf of defendants. This was the best evidence, and there was no error in excluding his written report.

It is next contended that instruction No. 2, requested by plaintiff, is erroneous. The substance of this instruction is that if the jury found at the time of his death that Juckett was of lessened or weakened physical and vital ability, and they further found that this condition was occasioned in any degree by his use of intoxicating liquors, "such finding is sufficient in law for you to further find that the death of said Delbert B. Juckett was caused or contributed to by his use of intoxicating liquor." The instruction is based upon the theory under which plaintiff seeks to recover, viz., that the excessive use of intoxicating liquors weakened Juckett physically to such an extent that he was unable to resist disease or exposure, and that as a result of such diseased and weakened condition he died from exposure. So far as the evidence

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shows, the death of Juckett was caused by inability to resist cold, or from fatty degeneration of the heart. A man in ordinary health, dressed as Juckett was on the evening of his death, would have been exposed to no risk of injury to his health from the mere fact that he drove in an open wagon a comparatively short distance when the temperature was somewhere between 12 and 20 degrees above zero.

Defendants requested, and the court gave, instructions to the effect that, if the jury found that at the time Juckett was examined for life insurance, he was not exhausted and depleted in his physical and vital forces and was not suffering from heart trouble, but was in good physical and mental condition, they must find in favor of all the defendants from whom liquor was procured prior to that time; that if Juckett did not die from exhaustion and depletion of his vital forces caused or contributed to by his use of intoxicating liquors obtained from the defendants, but from some other independent cause, the saloon-keepers and their sureties are not liable, and their verdict should be for the defendants; that if they found the death was caused by heart trouble, brought on through lifting hogs, or through some other cause with which the drinking of liquors had nothing to do, then they should return a verdict in favor of defendants. When instruction No. 2 is considered in connection with the whole charge, which carefully protects the rights of defendants, and with the facts in evidence, we find it was not prejudicially erroneous.

It is contended that the verdict is not supported by sufficient evidence. It is undisputed that prior to 1910 Juckett, although he occasionally drank a glass of beer or stronger liquor, was not even what is termed a moderate drinker. His wife says he did not use liquor at all in 1907, and that in 1910 and thereafter he drank it to excess almost every time that he visited neighboring towns. As time passed on he became drunk more frequently. Up till 1913 the family lived on the farm of

Juckett's father in Saunders county. In that year he purchased an equity in a farm of 160 acres in Antelope county and removed there, where he continued to reside until his death. In that county he patronized the saloons of defendants who lived therein, and often carried whiskey home with him when he left the towns.

The evidence shows that after he began the excessive use of liquor he complained of trouble with his heart, that it did not beat at times. The last year he lived in Saunders county he procured aromatic spirits of ammonia as a stimulant. His extremities would become cold and he would have difficulty in getting warm. He was very much troubled with constipation and used medicine to overcome this condition. After they moved to Antelope county he had several sinking spells of like nature to those which he had in Saunders county. When in Antelope county he continued to drink to excess and would frequently come home very much under the influence of liquor. He usually brought liquor home with him on such occasions and sometimes failed to get home until the next day. After these debauches he was nervous and depressed, and usually ate little and slept a good deal until he became thoroughly sober. On December 23, 1913, he left home about 11 o'clock in the morning, went to Royal, and came home at midnight drunk. He had slipped or fallen forward and was upon his knees in the wagon. He had some groceries and a quart bottle of whiskey. He went to bed about 1 o'clock that night, got up the next afternoon, complained of headache and of being chilly and cold. The next day he did not work. On Christmas day he was ill and ate nothing but some chicken broth, and the next day he took a load of corn to Royal. He left home at about 11 o'clock A. M. About midnight his wife heard the team come home. She saw no one in the wagon box, but found Juckett in the front on his knees and lying or leaning over on his face. Part of his clothing was saturated with whiskey. She called the neighbors and tried to revive him, but without avail. No

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inquest was held. Two doctors testify that in their opinion he came to his death from the fact that his physical condition and vitality had been so weakened and undermined by the excessive use of intoxicants that he was unable to resist the cold and exposure, and that his weakened condition was the proximate cause of his death. A number of physicians testified on the part of defendants that he might have died from apoplexy or from some heart trouble, but on cross-examination they stated that the continued use of intoxicating liquors might have a tendency to cause apoplexy. The general trend of their testimony, however, was that he might have died from some other cause. It is shown that when not upon one of these periodical sprees Juckett was above the average man in ability. He had been a superintendent of schools, had taught the use of musical instruments, was successful as a breeder of thoroughbred hogs and made a good income from his farm. He was stout and stocky in build and was able to do hard work upon the farm during the summer of 1913. The testimony of his wife is that he made \$3,000 a year from the sale of his hogs and about \$2,000 from the farm, but that there were about \$2,500 expenses, so that his net income was about \$2,500 per annum. It is shown, however, that the only property he owned was his interest in the Antelope county farm, upon which he still owed \$6,600, and the personal property on the farm. There is proof as to each of the defendants, against whom a verdict was rendered, that he had procured liquor in their saloons with more or less frequency during the license years of 1911, 1912 and 1913. The proof as to some of the defendants was that he had purchased liquors from them only once, or perhaps twice; but it is clear that it was purchased during this period in which the habit of intoxication was being formed. Under the drastic provisions of the statute, the saloon-keeper who sells one glass of liquor which tends to produce such a condition is as much liable for the results thereof as he who sells in greater quantities.

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The defendants contend that the evidence shows that Juckett was strong and able to do heavy work in 1913; that he was examined in the latter part of May for life insurance and passed; and that there could be no liability except on the part of Brennaman, who sold liquor to him thereafter. It was for the jury to determine from all the evidence whether the death of Juckett was caused by the use of intoxicating liquor, and, if so, whether it was the result of recent drinking or whether it was contributed to by sales made to him by all the defendants. There is evidence to support either view.

It is argued that the verdict of \$17,000 is excessive. Juckett's expectancy was about 24 years. The evidence is not clear as to how much he devoted to the support of his family each year, but if he contributed \$1,500 a year, which seems a fair conclusion from the evidence, the present worth would exceed the amount of the verdict. The recovery seems large, yet the loss to the family may far exceed the monetary return. For the reasons set forth, the judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

HENNING JOHNK ET AL., APPELLEES, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED APRIL 29, 1916. No. 18860.

Waters: STREAMS: FORMATION OF NEW CHANNELS: RIGHT OF RESTORATION. A riparian owner may restore to its former channel a stream which erosion has caused to flow in a new channel upon his land, providing he does so within a reasonable time after the new channel formed and before the interests of lower riparian proprietors along the course of the old channel would be injuriously affected by such action on his part, as, for instance, where they have con-

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structed roadways across the former channel, have erected wind-mills and pumps in order to replace the water of which they were deprived by the diversion, and where the old channel has become shallow by the deposit of silt, the growth of vegetation, and other means.

APPEAL from the district court for Colfax county: CONRAD HOLLENBECK, JUDGE. *Affirmed.*

Edson Rich, for appellant.

Cain & Mapes, contra.

LETTON, J.

This was an action in equity to restrain the defendants from restoring the waters of a natural watercourse, known as Shell creek, to their former channel. The flow had become diverted so as to abandon the natural channel, and by means of a ditch, known as the Bailey ditch, reached another ditch parallel to the line of the Union Pacific Railroad Company and close to its track. Shell creek rises in Boone county and flows in a southeasterly direction into the Platte river. For a distance of almost six or seven miles it flows almost parallel to the track of the railroad company. At one point in its course where it flowed through the land of the defendants Bailey its banks were low. When in flood the excess waters of the stream flowed southwardly through the Bailey ditch into the railroad ditch. This had been dug by the railroad company parallel and close to its right of way from where it received the water from the Bailey ditch to a point several miles to the east, where the accumulated waters passed under the railroad track through a bridge, and thence to the river. The railroad ditch being of greater depth at the point where the flood waters of Shell creek flowed into it and the soil being easily eroded, a scarp or fall was formed in the Bailey ditch, which in the course of years gradually worked backward to a point about 40 rods south of Shell creek. By the spring of 1908 this erosion had reached nearly to a bridge which had been erected over the Bailey ditch near the creek. Several witnesses testify

that by reason of heavy rains early in 1908 erosion proceeded much more rapidly, until at last there were only a few yards of clay or hardpan forming a barrier between the normal flow of Shell creek and the bottom of the Bailey ditch. In that year during times of high water in the creek the waters flowed both in the channel of the creek and through the ditch. Finally the barrier was worn through and washed away and the entire flow of the creek was diverted through the ditch. The former channel became partially filled with silt deposited from flood waters; weeds and bushes grew up in it and decayed; farmers along its course made earthen road crossings over it, and some of them were compelled to erect windmills and pumps to provide water for their live stock. The surface of the stream in the new bed at the point of diversion is now about six feet lower than the bed of the old channel. In 1912 or 1913 the railroad company, believing that the flow of the water in the ditch near their track was endangering their property, decided, with the consent of the owners of the land at the point of diversion, to build a dam at the head of the ditch and thus restore the waters to their former channel. The plaintiffs, who are owners of farms through which the former channel extends, insist that the stream changed its flow from natural causes; that the changed condition has existed many years; that the ancient channel below the head of the ditch is now insufficient to carry the waters of the creek; and that if the waters are diverted into the old channel they will overflow and inundate several hundred acres of their land and will injure and destroy their crops. They also assert that, by reason of the gradual change of the channel, the stream flowing through the ditch has become a natural watercourse; that they have changed their situation relying upon the present conditions; that defendants acquiesced in the new conditions, and now have no right to interfere with the present flow. Defendants contend that they have ten full years within which to restore the normal flow of Shell creek to its original channel. The dis-

strict court found for the plaintiff and granted a perpetual injunction. Defendants appeal.

The evidence is clear that, though the flood waters of Shell creek flowed down the Bailey ditch for many years, the ordinary flow did not enter into the ditch until in 1908. In April, 1909, a letter was written by one French, a farmer owning lands through which the railroad ditch passed, calling the attention of the railroad company, through its engineer, to the fact that all the water in Shell creek had been diverted through the Bailey ditch the previous year, had been flowing through the ditch all winter, that the creek was filling up, and suggesting the results liable to follow. A representative of the railroad company went with Mr. French to view the point of diversion. At that time some water was flowing in both channels, but soon afterwards it was only during times of excessive floods that water flowed in the old creek bed. The evidence seems to establish the fact that the change in the channel was quite gradual; first the flood waters only followed the new course, then as the clay barrier wore away the normal flow divided, part running in each channel, and finally a complete diversion took place. The ditch then became a natural watercourse, and so continued when the trial was had. *Pyle v. Richards*, 17 Neb. 180; *Town v. Missouri P. R. Co.*, 50 Neb. 768; *Gray v. Chicago, St. P., M. & O. R. Co.*, 90 Neb. 795; *Wholey v. Caldwell*, 108 Cal. 95, 30 L. R. A. 820.

If the defendants had erected a barrier to prevent the natural and normal flow of the stream from following the new channel, within a reasonable time, they would have had that right.

The crucial question is whether, after having stood by with knowledge of the conditions from the spring of 1909 until the latter part of July, 1912, when the conditions had materially changed, defendants may still put in a dam and return the waters to their former bed. In most of the cases involving the right to restore a stream to its former channel over the protest of the former riparian own-

ers, a much longer time had interposed than in this case. In a number the period was more than ten years, which was the statutory period of limitation. In such case the court held that the former proprietors had become entitled to hold their land free of being servient to the flow of the water in its natural channel. *Smith v. Musgrove*, 32 Mo. App. 241; *Kray v. Muggli*, 84 Minn. 90; 1 Wiel, Water Rights (3d ed.) sec. 60. In some cases, though 10 years had elapsed, the statute of limitations was not applicable, since in the state where the question arose the period of prescription was 15 years. In such cases the question was considered to be somewhat of the nature of one pertaining to the dedication of a highway, and it was held that if the conduct of the owner of the land where the stream now ran was such as to show an intention on his part that it should continue to run in the new course, and former riparian proprietors had accepted the new conditions, acted accordingly, and their interests would be injuriously affected by a change, the owner could not restore the stream to its former channel against their protest and without their consent.

In Vermont the statute of limitations is 15 years, but the court, in a case where a stream was suddenly changed by a flood so as to form a new channel and thus flowed for ten years, held that, on account of acquiescence in the running of the stream in the new channel and in the creation of new interests, the defendant would not be permitted to return the stream to the former channel. *Woodbury v. Short*, 17 Vt. 387. In *Ford v. Whitlock*, 27 Vt. 265, it is held that, if the diversion affects other proprietors unfavorably, it requires 15 years to give the right to keep the stream in the new channel. This is owing to the fact that their right of action does not lapse for that period, but, if it affects them favorably, the rule is the same as applies to a dedication of a road. "Any term is sufficient which satisfies the jury that the public was justified in treating it as a permanent dedication."

Washburn, Easements and Servitudes (4th ed.) *315, says: "In these and like cases, where one, who owns a watercourse in which another is interested, or by the use of which another is affected, does or suffers acts to be done affecting the rights of other proprietors, whereby a state of things is created which he cannot change without materially injuring another who has been led to act by what he himself had done or permitted, the courts often apply the doctrine of estoppel, and equity, and sometimes law, will interpose to prevent his causing such change to be made." See, also, 40 Cyc. 609, note 55.

Yazoo & M. V. R. Co. v. Brown, 99 Miss. 88, 33 L. R. A. n. s. 804, is not in conflict with this holding. In that case the water of the creek left the old channel in the spring of 1908 and flowed into the ditch of the railroad company. The same year the railroad company attempted to divert the water back into the old channel by building dams, which were washed away. In 1909, by driving piling, a dam was finally constructed which forced the water back. The action was brought by the owner of the land below the point of diversion to recover damages incurred by the construction of the latter dam and the return of the water to the ancient channel. The court held that plaintiff had no cause of action. This would have been the conclusion of this court under the same circumstances, since the defendant acted promptly and no rights had intervened.

The case of *Roe v. Howard County*, 75 Neb. 448, is in accordance with the doctrine of the Vermont court in holding that an easement by prescription against persons unfavorably affected can be acquired only by an adverse user for ten years. This does not aid defendants' contention. Had defendants taken steps to restore the stream to its former channel promptly, before the former channel had been obstructed by silt and vegetation, and before plaintiffs had incurred expense in supplying their want of water by artificial means, there is no doubt they would have had the right to do so, but we think their acquies-

Davis v. Union P. R. Co.

cence and the changed conditions warrant the relief granted plaintiff by the district court.

AFFIRMED.

SEDGWICK, J., not sitting.

CHARLES DAVIS, APPELLEE, v. UNION PACIFIC RAILROAD
COMPANY, APPELLANT.

FILED APRIL 29, 1916. No. 18628.

Carriers: INJURY TO PASSENGER: DEFENSE. In a suit for damages for personal injuries, an act of God is no defense if defendant's negligence was a concurrent cause of plaintiff's injuries.

APPEAL from the district court for Valley county:
JAMES R. HANNA, JUDGE. *Affirmed.*

Edson Rich, A. G. Ellick and B. W. Scandrett, for appellant.

E. P. Clements, contra.

ROSE, J.

This is an action to recover damages in the sum of \$2,610 for personal injuries sustained by plaintiff while a passenger on a train running on defendant's railroad track from North Loup to Ord. Plaintiff pleaded that the car in which he was riding was blown from the track by a storm and overturned about three miles from North Loup. He alleged further:

"That a stove placed in said car by the defendant was so carelessly and negligently secured and fastened to the floor of said car and the fastenings of said stove were so carelessly and negligently maintained by the defendant that when said car was overturned said stove broke said fastenings and was hurled against and upon the plaintiff,

and the plaintiff was thereby greatly injured; that the overturning of said car by said storm would not have caused said stove to break loose from the floor of said car if said stove had been properly secured and the fastenings thereof properly maintained; that the plaintiff was uninjured by the overturning of said car, and, had it not been for the negligence and carelessness of the defendant and its servants in securing said stove in said car and in permitting the fastenings of said stove to become out of order, the plaintiff would have escaped injury."

Defendant denied negligence, and pleaded that the storm which overturned the car was the act of God and the sole cause of plaintiff's injuries. The reply to the answer admitted that the storm was an act of God resulting in the overturning of the car, but pleaded:

"The plaintiff alleges that his injury and damages were not caused by, or the natural result of, the overturning of said car, but were wholly the result and consequence of the negligence of the defendant in failing to secure and properly maintain the fastenings of the stove placed in said car by the said defendant."

The jury rendered a verdict in favor of plaintiff for \$170.81. Defendant moved for a judgment in its favor on the pleadings notwithstanding the verdict. Rev. St. 1913, sec. 8008. The motion was overruled. From a judgment on the verdict, defendant has appealed.

There is no bill of exceptions preserving the evidence, and the only question presented by the appeal is: Should the trial court have sustained the motion of defendant for judgment in its favor notwithstanding the verdict? The answer depends on the pleadings. For the purposes of this question the allegations of the petition and the reply must be regarded as established. Plaintiff alleged that his injuries were not caused by the overturning of the car. He pleaded that they resulted from negligence of defendant in failing to properly fasten the stove. The rule is that an act of God is no defense if defendant's neg-

ligence was a concurrent cause of the injury. *Amend v. Lincoln & N. W. R. Co.*, 91 Neb. 1. In 1 Shearman and Redfield, Negligence (6th ed.) sec. 39, it is said:

"It is universally agreed that, if the damage is caused by the concurring force of the defendant's negligence and some other cause for which he is not responsible, including the 'act of God' or superior human force directly intervening, the defendant is nevertheless responsible, if his negligence is one of the proximate causes of the damage, within the definition already given. * * * But if the superior force would have produced the same damage, whether the defendant had been negligent or not, his negligence is not deemed the cause of the injury."

It follows that the motion for judgment in favor of defendant notwithstanding the verdict was properly overruled.

AFFIRMED.

HAMER, J., dissenting.

There was no bill of exceptions brought to this court. The case was disposed of on the petition, the answer, and the reply, together with a motion for judgment notwithstanding the verdict. This requires a careful examination of the petition, the answer, the motion for judgment notwithstanding the verdict, and the reply. The petition alleges that the plaintiff purchased a ticket at North Loup April 25, 1912, which entitled him to ride from North Loup to Ord on the defendant's railroad, and that he then became a passenger on said railroad between said points; that while the train was running between said stations, and at a point about three miles northwest of North Loup, a violent storm blew the car in which the plaintiff was riding from the track, and that it went over upon its side; "that when said car was overturned said stove broke said fastenings and was hurled against and upon the plaintiff." It was the stove which was hurled. According to the answer, and also according to the reply, the thing which broke the stove loose and which hurled

it was the act of God. It was within the power of the act of God to use whatever force was necessary to break the stove loose. For this reason nothing within the ingenuity or power of man was sufficient to overcome the act of God.

The answer admits that the plaintiff was a passenger on the cars of the defendant, and that he was being transported from North Loup to Ord, and alleges that "a violent wind storm arose which blew said train from said track, and upon its side; but defendant alleges that the wind storm was of a tornado or cyclonic nature, of extraordinary force and violence, an act of God, and beyond all human power and agency to either resist or control, and of such force, violence and sudden approach that it could not be anticipated by human foresight, and was beyond the power of this defendant and all other human power to avoid or guard against." The allegations in the answer, to the effect that the storm was of extraordinary force, and that it was the act of God, and that the car was overturned thereby, are admitted by the reply. The reply admits "that said storm was of extraordinary force and violence and was an act of God, and that said car was overturned thereby." It was probably on this admission contained in the reply that no bill of exceptions was settled and brought to this court. The allegation in the reply that "said storm * * * was an act of God, and that said car was overturned thereby," was enough to show that all the power required to overturn the car was at hand. The act of God was of itself enough to make the storm irresistible. The plaintiff put in his reply an admission that of necessity must determine the case against him if any attention is paid to the thing which he pleaded. After he had conceded that the storm was an act of God, and that it overturned the car, he proceeded to allege that his injury and damages were not caused by the overturning of the car, but by the negligence of the defendant in failing to secure the fastenings of the stove in said car. He undertook to state something, but he does it by way of conclu-

sion, and no steps leading up to what he claims are set out. Of course, he could make no admission so bad that he might not say something so far as words are concerned. If the plaintiff's head had been cut off, it might be considered that there was nothing further to allege. The reply in this case undertakes to allege something further after making a reply which stipulates away the merits of his case. It is the contention in the majority opinion that there can be a sufficient reason given for *bringing about a certain result*, and yet something else may *contribute*. If the reason is given, that is enough. When the defendant moved for judgment notwithstanding the verdict, that was in the nature of a demurrer to whatever allegations of fact were well pleaded. The motion did not admit the truth of impossible things or inconsistent things. If the act of God was the *proximate cause of the injury*, then there could be *nothing else*. Could it reasonably have been foreseen that a storm would arise, that it would blow the train from the track, and cause the car in which the plaintiff was riding to be thrown off the track and thrown over upon its side?

Section 6052, Rev. St. 1913, provides: "Every railroad company shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the persons injured, or when the injury complained of shall be the violation of some express rule or regulation of such road actually brought to his or her notice." To these exceptions there should be added, by operation of law when the injury occurs by the act of God.

As the storm which overturned the car was admitted in the reply to be the act of God, and the fastenings which held the stove "broke" while the car was being *overturned*, and the force of the storm overturned the car and broke the fastenings and "hurled" the stove against the plaintiff, it was the storm which caused the injury, and therefore there is no liability. Take out the storm and what is left? Take out the storm that caused the injury and nothing is left. Therefore it *was the storm*.

As the force which overturned the car and broke the fastenings was the act of God, no one can be heard to say that the power was insufficient to break the fastenings, however they may have been made. The act of God as against the strength of the creations of men and their ingenuity is irresistible. If it was strong enough to lift the car off the track, then it was strong enough to lift everything in that car and put it off the track along with the car. It lifted the stove with the car, and in the language of the petition "when said car was overturned said stove broke said fastenings and was hurled against and upon the plaintiff." Here is a statement from which it is fairly to be inferred that the act of God lifted the stove, and in lifting it broke the fastenings and then hurled the stove against the plaintiff. The plaintiff undertakes an impossible problem; that is, to *divide the force* and to say that it *stopped* with lifting the car and its contents off the track; and he undertakes to say "that the overturning of said car by said storm would not have caused said stove to break loose from the floor of said car if said stove had been properly secured and the fastenings thereof properly maintained." He undertakes to make the power of man superior to the power of God. When the act of God is without power to accomplish that which it seeks to do when arrayed against the power of man, then plaintiff may present such a problem. The statement that the fastenings of the stove were not "properly maintained" is not supported by any details of fact; only a conclusion is stated. We do not know the manner in which the stove was fastened, nor by what it was fastened; the only thing we are permitted to know under the statement is that the act of God first hit the car and then moved the stove until it was hurled against the plaintiff. The extraordinary force and violence of the storm are *specifically* admitted; that the storm was an act of God is also *specifically* admitted; that the car was overturned by said storm is also specifically admitted; and there is no denial of the fact alleged that the storm was "beyond all

human power and agency to either resist or control." The allegations of the *answer are not denied*.

No one may be able to tell the force of the storm which comes from the source of unlimited power, nor may any one prepare against it. The storm is admitted by the pleadings to be the act of God, both in the answer and in the reply, and it is shown by the statement contained in the reply to have been the force that overturned the car and broke the fastenings which secured the stove, and which said stove, as alleged in the petition, was "hurled" against the plaintiff. It will not therefore be deemed that the fastenings were weak or insecure or improperly made, but only that they were *overcome* by the force of the storm, which may be considered to have been irresistible *because* it was an act of God.

It is a fundamental proposition in the law of negligence that, to make an act of negligence actionable, there must exist three elements: (1) A duty or obligation which the defendant is under to protect the plaintiff from injury. (2) A violation of that duty; that is, a failure to perform the duty or obligation owed. (3) Injury resulting from the failure. In the present case the duty was to secure the stove with fastenings sufficient to hold it in a safe position while the car was subjected to its *ordinary uses*. It is manifestly impossible to anticipate that a certain car will be subjected to the stress and strain of a cyclone, and equally impossible to know how to secure a stove in a car in such a manner that, if the car is subjected to a wind of such fury as to establish that it is an act of God, the stove will remain secure. That is only another way of saying that man is stronger than the Supreme Power. The act of God is an act of Omnipotence, or power which human agency cannot prevent or stay. 4 R. C. L. p. 708.

It is not claimed that the stove was secured in a manner which made it unsafe when the car was in ordinary use. The car was thrown from the track by an act of God. The act of God therefore, as admitted in the reply, became the direct and *proximate* cause of breaking the fastenings

which secured the stove. They were broken by a force which could not have been guarded against.

Nearly every neighborhood has had at least one such storm. When a tiny whirlwind goes round and round down by the little creek in the lonesome woods, and then slowly and softly emerges and goes tiptoeing across the meadow, and the fields, and farms, and prairies, rapidly gathering strength and anger as it journeys upon its dangerous course, lifting the river out of its bed, and twisting the strong oaks and elms standing on its banks until only splintered stumps remain, picking up the settler's house, and barn, and granary, and the windmill standing at his well, and sweeping them into space, so that they come back no more, and never again are seen by the eyes of men—it is this that is the act of God and against which the ingenuity and strength of men are futile.

In *McClary v. Sioux City & P. R. Co.*, 3 Neb. 44, a train was running three-quarters of an hour behind the usual, ordinary and advertised time. It was upset by a sudden gust of wind which crossed the track. It was contended that if the train had been running on time the wind would not have reached it. In an action for damages because the plaintiff was cut and bruised, it was held that there was no liability, that the injury complained of was not the natural result of the train being behind time, and that the damages sustained were too remote to entitle a recovery against the carrier.

In *Galveston, H. & S. A. R. Co. v. Crier*, 45 Tex. Civ. App. 434, the plaintiff alleged as negligence that the defendant ran its train at an excessive rate of speed directly into the path of the storm, which he could and should have avoided by coming to a stop. The court said that there was nothing to show that the defendant's engineer and conductor were guilty of negligence in failing to stop the train before encountering the whirlwind, had they known, or had reason to believe, it was impending; but they had no more reason to believe that it would strike the railroad

where it did than any place along its road where the train might have stopped.

The case of *Amend v. Lincoln & N. W. R. Co.*, 91 Neb. 1, cited in the majority opinion, does not seem to be in point. In that case part of a family, including the decedent, were lifted from a porch roof by a rescue party into a boat, and then the boat started for a place of safety, going over flood waters which surrounded the building. The boat came in contact with a telegraph or telephone pole and was accidentally overturned, and the plaintiff's daughter was drowned. The flood which made the trip in the boat necessary was claimed to have been occasioned by the construction of railroad tracks which prevented the water from escaping in natural channels. The liability of the railroad companies was alleged to be based upon the fact that the road had been so constructed as to impound the water and prevent it from being carried away. The flood case cited lacked the question of sudden and unexpected approach of the storm as that question is presented in the instant case, and it lacks the question of the act of God being irresistible; it also lacks the question of inferiority of the works and strength of man as compared with the act of God, and it lacks the attempted cutting off of the power projected, which is not in the instant case attempted to be stated by the defendant. The superiority of the act of God over the ingenuity and strength of man is not presented in the case cited.

The right of the defendant to build its railroad and run its cars without confiscation by an apparently unfriendly judicial proceeding is protected by the federal Constitution (*Amend.*, art. XIV, sec. 1). The purpose sought in the instant case is to take the property of the railroad company without due process of law, and to deny to the railroad company the equal protection of the law. The defendant cannot properly be held to be liable to the plaintiff in an action for damages for injury based upon the alleged negligence of the defendant railroad company; there being no negligence in the defendant's failure to fore-

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see the storm, or to successfully guard against its force. It is an arbitrary thing to punish the defendant for that which it could not anticipate and could not resist.

It is also in violation of section 3, art. I, Const. Neb., which reads: "No person shall be deprived of life, liberty, or property without due process of law."

LYDE S. MCCrackEN, ADMINISTRATOR, APPELLEE, v. FRED-
ERICK A. DELANO ET AL., RECEIVERS, APPELLANTS.

FILED APRIL 29, 1916. No. 18856.

1. **Railroads: DEATH OF EMPLOYEE: LIABILITY: NEGLIGENCE.** Where a railroad company's rules, of which a section-foreman has notice, require him on approaching a sharp curve through a deep cut on a handcar to send a man ahead to look for a train, the mere failure of trainmen to give warning of their approach, before the presence of section-men on the track is discoverable, is not negligence, in the absence of a statute or a rule requiring them to do so, since the trainmen may assume, until the contrary appears, that section-men will obey reasonable, known rules promulgated for the safety of themselves and others.
2. **Negligence: RAILROADS: FAILURE TO BLOW WHISTLE.** Failure of a train crew to blow the whistle on approaching a railroad bridge at an undergrade roadway is not negligence, as a matter of law, in absence of a statute or a rule imposing such a duty.

APPEAL from the district court for Douglas county:
JAMES P. ENGLISH, JUDGE. *Reversed.*

John L. Webster and James L. Minnis, for appellants.

Earl R. Ferguson, C. R. Barnes and Harry W. Shackelford, *contra*.

ROSE, J.

This is an action in the district court for Douglas county against the receivers of the Wabash Railroad Company to

recover damages in the sum of \$16,000 for causing the death of David W. Gilbert. From a judgment in plaintiff's favor for \$5,250, defendants have appealed.

For the purposes of the appeal some of the pleadings, facts, contentions and proofs may be summarized as follows: Gilbert was a section-foreman in the employ of defendants. August 8, 1913, after a day's work, he and his section-crew started home on a handcar, going northward down grade toward Imogene, Iowa. A south-bound freight train consisting of a locomotive and 24 cars, on its way from Council Bluffs, Iowa, to Stanbury, Missouri, struck the handcar about a mile south of Imogene, and Gilbert was fatally injured. According to plaintiff's brief the following elements of negligence were charged: "Failure to give reasonable and proper warning of the approach of the train; failure to exercise reasonable care to discover the deceased in his situation of peril; and failure to use reasonable diligence and effort in slowing down or stopping the train after the presence of the handcar on the track was, or should have been, discovered." The collision occurred at the north end of a bridge about a mile south of Imogene. Immediately north of the bridge there is a sharp curve with the convex on the west, where the track runs through a cut having a high bank on the east. At the north end of the bridge the section-crew attempted to remove the handcar from the track. While one wheel was between the rails they all jumped except the foreman. The handcar was struck while Gilbert was still trying to remove it. There is testimony tending to show that a man on the bridge could have seen the approaching train 500 feet away, and that the fireman could have seen a man on the bridge at the same distance. The train was running up grade 18 miles an hour, and was 1 hour and 30 minutes late. The trainmen testified that the whistle was blown at Imogene, and that the automatic bell was kept ringing until the steam was shut off in the attempt to stop the train. A witness for plaintiff said that he was standing 125 feet east of the bridge, where he saw the collision, that

he heard no warning, and that the train did not slacken its speed until after it struck the handcar. On defendants' behalf there was testimony that the fireman, who occupied the east side of the cab, could not see a handcar on the bridge when more than 350 feet away; that he did see it at a distance of 300 or 350 feet; that he promptly warned the engineer; that the latter immediately shut off the steam and set the brakes; that the locomotive was stopped about 275 feet beyond the point of impact; that a rule of the company required section-foremen in approaching a curve or a cut on a handcar, when in danger of meeting a train, to keep a lookout and to send a man ahead, and that Gilbert knew of this rule.

One of the questions submitted to the jury was the alleged negligence on the part of the trainmen in failing to give warning as they approached the bridge through the cut. On this subject the trial court instructed:

"If you find that in approaching the said town of Imogene and in passing through the same the defendants' employees in charge of said locomotive did in fact sound such signals or alarms, but further find that the location of the bridge over which the deceased passed just prior to the accident and the curve around which the said train proceeded before reaching the said bridge were such as to require that, in the exercise of reasonable care, the employees of the defendants in charge of the said locomotive should have given signals other than or different from or in addition to the ones in fact given, or that signals should have been given at a point closer than the town of Imogene, and further find that the defendants' employees in charge of the said locomotive failed to give such signals as were required in the exercise of reasonable care upon their approach to said curve, or bridge, such failure to so give such signals would constitute negligence for which the defendants are liable."

This instruction is challenged as erroneous. Defendants argue that it was the duty of the foreman of the section-crew to keep a lookout and to send a man ahead to see

if a train was hidden from view in the curve behind the bank. In this connection it is further argued that negligence of the train crew cannot be based on their failure to give a warning, since they had a right to assume that the section-foreman would not disobey a reasonable, known rule. These propositions urged by defendants do not rest on contributory negligence. Plaintiff pleaded and proved an Iowa statute providing that contributory negligence is not a bar to a recovery for personal injuries. An act of congress contains a similar provision. In this respect, therefore, it is immaterial whether plaintiff relies on the statute of Iowa or the act of congress. In either situation contributory negligence on the part of the decedent does not bar a recovery by plaintiff. The question is: Should the jury have been permitted to find the trainmen guilty of actionable negligence, if the latter failed to blow the whistle or ring the bell while running through the cut toward the bridge? The duties of defendants in operating trains should be considered in connection with the duties imposed upon section-men. If the rules of the railroad company required Gilbert to keep a lookout and to send a man ahead to guard against the danger of approaching the curve on a handcar, defendants, in operating their trains, had a right to assume that those duties would be performed, there being nothing to indicate the contrary. Section-men are employed to keep the track in repair. They are under the direction of their superior. *Prima facie* their employer may rely upon them to perform their duties according to proper rules and regulations duly called to their attention. The law applicable to the present inquiry may be stated as follows:

Where a railroad company's rules, of which a section-foreman has notice, require him on approaching a sharp curve through a deep cut on a handcar to send a man ahead to look for a train, the mere failure of trainmen to give warning of their approach, before the presence of section-men on the track is discoverable, is not negligence, in the absence of a statute or a rule requiring them to do so, since

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the trainmen may assume, until the contrary appears, that section-men will obey reasonable, known rules promulgated for the safety of themselves and others.

The instruction is at variance with the law, and in the form in which the issues were submitted to the jury under the evidence it is clear that the error was prejudicial to defendants.

It is contended by plaintiff that the train crew were guilty of negligence in failing to give warning of their approach, because there was a roadway under the bridge. There was no proof of a statute or a rule requiring them to do so. The common law imposed no such duty. *Houston & T. C. R. Co. v. Sgalinski*, 19 Tex. Civ. App. 107. The judgment, therefore, cannot be sustained on this ground.

For the reasons stated, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

HAMER, J., not sitting.

STATE, EX REL. TOWN OF EWING, APPELLANT, v. TOWN OF GOLDEN ET AL., APPELLEES.

FILED APRIL 29, 1916. No. 19555.

Towns: POWER TO CREATE. In a county under township organization the board of supervisors may create new towns. Rev. St. 1913, secs. 995, 1054, 1068.

APPEAL from the district court for Holt county: R. R. DICKSON, JUDGE. *Affirmed.*

H. M. Uttley, for appellant.

J. J. Harrington, contra.

ROSE, J.

This is a proceeding in the nature of *quo warranto* to test the legal existence of the town of Golden, the town of Ewing being relator. Holt county adopted township government in 1887, the town of Ewing consisting of townships 26 and 27, in range 9, and the east half of the two adjoining townships on the west. The county board of supervisors made an order July 14, 1915, dividing the original town of Ewing, the south half retaining that name and the north half being organized as the town of Golden. Relator took the position that the order of the board of supervisors was void as having been made without authority of law. The district court dismissed the action, and relator has appealed.

The vital question upon appeal is: Had the board of supervisors authority to divide the old town and to create a new one? The answer depends upon the legislation on the subject of township government. The statute provides:

"When the board of supervisors shall have been organized as stated in the preceding sections they shall at once divide the county into townships by making such townships conform as nearly as practicable to townships according to government survey. * * * When any government township shall have too few inhabitants for a separate organization, then such township may also be added to an adjoining township or the same may be divided between two or more townships for the time being." Rev. St. 1913, sec. 995 (Laws 1895, ch. 28, sec. 9).

"In addition to the powers hereinbefore conferred upon all county boards, the board of supervisors shall have power * * * to change the boundaries of towns, and to create new towns as provided by law." Rev. St. 1913, sec. 1068 (Laws 1879, p. 372).

Relator contends that the latter section is unconstitutional. It was part of an act "Concerning counties and county officers," and was passed in 1879. Laws 1879, p. 353. The argument seems to be that the grant of power to the board of supervisors was invalid, because, at that time,

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there was no law authorizing a county to adopt township organization, the act of 1877, providing for township organization, having been declared unconstitutional. *State v. Lancaster County*, 6 Neb. 474. While the provisions relating to the board of supervisors may have been without practical effect in absence of a law authorizing township organization, the act of 1879 was not for that reason unconstitutional. *Albert v. Twohig*, 35 Neb. 563. Later the legislature enacted a law providing for township organization. Laws 1883, ch. 36. It did not, however, purport to completely define the powers and duties of the county board of supervisors. The lawmakers obviously intended that the existing provisions of the act of 1879 on that subject should apply to all counties adopting township organization. The act of 1883 was subsequently repealed and a new law substituted. Laws 1895, ch. 28. No provision of the act of 1879, in relation to the county board of supervisors, was repealed. On the contrary, it was provided:

"In the absence of any special provision governing the board of supervisors as contemplated by this act, such board of supervisors shall be governed by and perform all the duties and have all the powers applicable to county boards as provided by the general laws of this state." Laws 1895, ch. 28, sec. 73 (Rev. St. 1913, sec. 1054).

The act of 1879 was one of the general laws to which reference was thus made. Relator has not shown that the act assailed is unconstitutional or that the board of supervisors of Holt county exceeded its powers in creating the town of Golden.

Technical questions not affecting the merits of the controversy have been presented, but will not be discussed.

AFFIRMED.

MORRISSEY, C. J., not sitting.

FIRST NATIONAL BANK OF AUBURN, APPELLANT, v. GEORGE
C. PESHA ET AL., APPELLEES.

FILED APRIL 29, 1916. No. 18725.

Contracts: BUILDING CONTRACT: BOND: SURETY AND ASSIGNEE: PRIORITIES. A surety on the bond of a contractor, given to secure the payment of all claims for labor and materials furnished in constructing a public building, who, after default by the contractor, has paid any of such claims, has an interest in any final balance due the contractor on completion of the building superior to that of the contractor's assignee, notwithstanding the fact that the assignment may have been executed and filed prior to payment of such claims by the surety, and was given in consideration of money advanced to the contractor and used by him in the construction of the building.

APPEAL from the district court for Nemaha county:
JOHN B. RAPER, JUDGE. *Affirmed.*

Kelligar & Ferneau, for appellant.

Nolan & Woodland, contra.

FAWCETT, J.

Defendant Pesha entered into a contract with the school district of Auburn for the erection of a high school building for the contract price of \$39,105, and, in compliance with the provisions of section 3840, Rev. St. 1913, gave bond for the payment of claims for labor and material, defendant Equitable Surety Company executing the bond as surety. A copy of the contract, bond and technical and general specifications are attached to and made a part of the petition. The contract bears date March 5, 1912, and the bond March 12, 1912. On January 8, 1913, Pesha borrowed from plaintiff \$1,500, which sum was placed to his credit on open account. As security for this loan he gave plaintiff a written order or assignment, addressed to the board of education of the school district, directing them to

pay to plaintiff the sum named, and to "charge the same to my account as contractor with your district for the construction of the new high school building, now under course of construction, when the building is finished and accepted by you." Plaintiff filed this order with the school district. Pesha defaulted in the performance of his contract, and the school district completed the building. On completion of the building the sum of \$2,906.85 remained in the hands of the district as the balance of the contract price. Prior to his default, and subsequent to the assignment to plaintiff, Pesha, for materials furnished and used in the building, executed two assignments, one to John Westover, Incorporated, for \$2,342.27, and the other to Elmer Dovel for \$2,100. The defendant surety company paid these claims and took assignments thereof. Plaintiff claims priority over the rights of the surety company to the balance of the fund in the hands of the school district, and from a judgment adverse to such claim it appeals.

A public school building cannot be subjected to a mechanic's lien. Section 3840, Rev. St. 1913, requiring the contractor to give a bond, was doubtless enacted for the purpose of protecting mechanics and materialmen. The bond, therefore, became an essential part of the contract entered into by and between Pesha and the school district. The contract provided for estimates by the architect and for payments from time to time, and provided that "the amount to be paid to the contractor shall be eighty-five per cent. (85%) of the amount of such estimate on the presentation of the progress certificate." It also provided: "The final estimate shall be made when the architect is satisfied that the work is entirely and satisfactorily completed, at which time the contractor shall be entitled to the fifteen per cent. (15%) retainer from the progress payments, as balance due him on the contract."

The question to be determined is: Is plaintiff, by virtue of its assignment as security for money advanced to the contractor, entitled to priority over the surety who has by the terms of its bond been required to pay for materials

furnished for the construction of the building? A similar question, involving a bond given in compliance with a federal statute relating to the construction of public buildings, was before the supreme court of the United States in *Hardaway v. National Surety Co.*, 211 U. S. 552, where it is held: "The right of the surety on a bond for performance of a contract given under the act of August 13, 1894, c. 280, 28 Stat. 278, to be subrogated to the contractor's claim for balances due from the Government, is superior to that of one advancing money to the contractor on assignment of such claim."

In that case the court followed *Prairie State Bank v. United States*, 164 U. S. 227, 230, wherein it is said: "Thus the respective contentions are as follows: The Prairie Bank asserts an equitable lien in its favor, which it claims originated in February, 1890, and is therefore paramount to Hitchcock's lien, which it is asserted arose only at the date of his advances. The claim of Hitchcock, on the other hand, is that his equity arose at the time he entered into the contract of suretyship, and therefore his right is prior in date and paramount to that of the bank. * * * That Hitchcock, as surety on the original contract, was entitled to assert the equitable doctrine of subrogation is elementary. * * * Under the principles thus governing subrogation, it is clear, whilst Hitchcock was entitled to subrogation, the bank was not. The former in making his payments discharged an obligation due by Sundberg for the performance of which he, Hitchcock, was bound under the obligation of his suretyship. The bank, on the contrary, was a mere volunteer, who lent money to Sundberg on the faith of a presumed agreement and of supposed rights acquired thereunder. The sole question, therefore, is whether the equitable lien, which the bank claims it has, without reference to the question of its subrogation, is paramount to the right of subrogation which unquestionably exists in favor of Hitchcock. In other words, the rights of the parties depend upon whether Hitchcock's subrogation must be considered as arising

from and relating back to the date of the original contract, or as taking its origin solely from the date of the advance by him. A great deal of confusion has arisen in the case by treating Hitchcock as subrogated merely 'in the rights of Sundberg & Co.' in the fund, which, in effect, was saying that he was subrogated to no rights whatever. Hitchcock's right of subrogation, when it became capable of enforcement, was a right to resort to the securities and remedies which the creditor, the United States, was capable of asserting against its debtor, Sundberg & Company, had the security not satisfied the obligation of the contractors, and one of such remedies was the right based upon the original contract to appropriate the ten per cent. retained in its hands. If the United States had been compelled to complete the work, its right to forfeit the ten per cent. and apply the accumulations in reduction of the damage sustained remained. The right of Hitchcock to subrogation, therefore, would clearly entitle him when, as surety, he fulfilled the obligation of Sundberg & Company, to the government, to be substituted to the rights which the United States might have asserted against the fund. It would hardly be claimed that if the sureties had failed to avail themselves of the privilege of completing the work, they would not be entitled to a credit of the ten per cent. reserved in reduction of the excess of cost to the government in completing the work beyond the sum actually paid to the contractor, irrespective of the source from which the contractor had obtained the material and labor which went into the building. That a stipulation in a building contract for the retention, until the completion of the work, of a certain portion of the consideration is as much for the indemnity of him who may be guarantor of the performance of the work as for him for whom the work is to be performed; that it raises an equity in the surety in the fund to be created; and that a disregard of such stipulation by the voluntary act of the creditor operates to release the sureties, is amply sustained by authority."

This is the general rule. *Labbe v. Bernard*, 196 Mass. 551, 14 L. R. A. n. s. 457, and note. In *Labbe v. Bernard*, it is said (p. 552): "While it is true that the rights of the sureties to the remedies of the principal do not become complete and are incapable of present enforcement until they shall have discharged their principal's obligation, yet their right becomes an inchoate one as soon as they have entered into the relation of suretyship; and their equitable assignment of their principal's rights and remedies, when completed by their performance of his obligation, relates back, as against each other and their principal, to that earlier time. (Citing cases). And all persons who have in the meantime received any securities or payments from either party to the principal contract, with notice of the facts and of the surety's responsibilities and consequent rights, must in equity hold them for his benefit."

It is insisted that, since the money loaned Pesha by plaintiff was used to pay expenses incurred in constructing the building, the surety company has received the benefit of such payments, liability on the bond being reduced to that extent. Plaintiff was under no obligation to advance the money, and, as shown by the above authorities, in doing so it acted voluntarily. It is not entitled to be subrogated, as against the defendant surety company, to the rights of Pesha's creditors to whom the money was paid.

AFFIRMED.

SEDGWICK, J., not sitting.

STATE, EX REL. LIZZIE SCHLEMMER, APPELLEE, v. LEE
WRIGHT, APPELLANT.

FILED APRIL 29, 1916. No. 18792.

1. **Appeal: BASTARDY: SUFFICIENCY OF COMPLAINT.** A bastardy proceeding, appealed to this court without a settled and certified bill of exceptions, presents simply the sufficiency of the complaint.
2. ———: ———: ———. The complaint examined, and *held* sufficient.

APPEAL from the district court for Douglas county:
CHARLES LESLIE, JUDGE. *Affirmed.*

Harry B. Fleharty, for appellant.

Matthew Gering, F. P. Marconnit and John G. Kuhn,
contra.

FAWCETT, J.

Defendant was complained against before a justice of the peace in Douglas county, on a charge of bastardy, and was bound over to the district court for that county. Trial was had to the court and a jury. The jury found the defendant guilty, and judgment was entered by the court charging defendant with the maintenance of plaintiff's child, in the sum of \$1,500, to be paid to the plaintiff in instalments, which need not be set out. Defendant appeals.

The bill of exceptions found in the record has never been settled by the district judge. It is not in any manner certified by the clerk of the district court, nor does it appear to have ever been filed in his office. Nor does any attempt seem to have been made by defendant to prepare his brief in accordance with the rules of this court. We have examined the complaint upon which the action is based, and find it sufficient.

AFFIRMED.

SEDGWICK, J., not sitting.

EFFA HILL, APPELLEE, v. CHARLES NAYLOR, EXECUTOR,
APPELLANT.

FILED APRIL 29, 1916. No. 18358.

1. **Deeds: CONVEYANCE OF HOMESTEAD BY SURVIVING SPOUSE.** An unmarried man is competent to convey title to real estate which he occupies, although it had been the homestead of himself and wife before her death.
2. ———: **ESCROW: DELIVERY AFTER DEATH OF GRANTOR.** A deed made pursuant to a contract that it shall be deposited as an escrow to be delivered to the grantee after the death of the grantor, and that the grantor may take possession of the deed, if the grantee fails to perform those things provided in the contract, and which constitute a valuable consideration for the deed on her part, becomes a valid conveyance upon the death of the grantor and performance of the contract on the part of the grantee.

APPEAL from the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Edwin D. Crites, for appellant.

Allen G. Fisher and *William P. Rooney*, *contra.*

SEDGWICK, J.

Johann Troutmann conveyed the real estate in question to this plaintiff by warranty deed. The deed was deposited in the First National Bank of Chadron, and something over a year afterwards Troutmann died, and left a will by which, in a residuary clause, he devised all of his real estate to persons other than the plaintiff. The defendant, Charles Naylor, as executor of the will, appears to have come into possession of the deed to this plaintiff, and, as a controversy had arisen as to the validity of the deed, he declined to deliver it to plaintiff. She began this action in the district court for Dawes county to determine her right to the deed. The court found in her favor, and ordered the deed delivered to her. The defendant has appealed.

The real estate was the homestead of Mr. Troutmann, but his wife was deceased before the execution of the deed, and he was therefore competent to convey the title which was held in his name. The defendant contends that the deed was not delivered and was not intended to take effect until after the death of Mr. Troutmann, and must be construed as an attempt to make a will, and as such is invalid, not having been executed with the formalities necessary to make a will. It is a general rule of law, that can be changed by the legislature only, that an instrument executed in the form of a deed which is to take effect after the death of the party executing the same, and has no effect in the present, is invalid as a conveyance. The question, then, is whether this deed conveyed a present interest in the real estate, or was not intended to have any operation or effect until after Mr. Troutmann's death. The intention and effect of the deed must, of course, be determined from the writings executed by the parties. If the meaning of the writings is doubtful, the circumstances surrounding the parties at the time of its execution and their subsequent conduct with reference thereto may be considered if they assist in ascertaining the true meaning of the contract. With this deed, a memorandum was signed by plaintiff and Mr. Troutmann, which recited "that the deed mentioned for the conveyance of the said property shall be delivered, for safe-keeping, and not to be delivered to the said Effa Hill during the lifetime of the said John Troutmann, and it is further stipulated and understood, by and between the said parties, that, in case the said Effa Hill shall refuse or neglect to comply with any of the covenants on her part agreed to be performed on her part, that it will be lawful for the said John Troutmann to take in his possession the said deed to which this agreement is attached." It is insisted that this language indicates that the deed remained in the possession and control of the grantor, and was not delivered to plaintiff for any purpose. But it must be noted that it is by the agreement of the grantee that the deed was deposited, and the memorandum

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does not reserve to the grantor an absolute right to cancel the deed. It must first be determined that the grantee had forfeited her right by failure to perform on her part. The parties must have supposed that to "take in his possession the said deed" would operate as a reconveyance to him. The memorandum provided that the grantee "will give the said John Troutmann exclusive use of the bedroom now occupied by him in the said house, allowing him to keep his wood and coal in the same separate from her own fuel, and that she will at all times keep his said room clean, and in good order, and will do his washing, and furnish him with good board during his lifetime, also in case of his sickness that she will nurse and take proper care of him, the same as if she was paid for the said service. It is further stipulated and agreed by the said Effa Hill that she will pay the taxes on said property as they may accrue, and all necessary repairs on the said property." The evidence shows that he had the use of the room stipulated for. She cared for the room and generally performed her contract.

If the grantor reserved the absolute and unqualified right to withdraw the deed and cancel the same, the depositing of the deed for safe-keeping would not be a delivery to the grantee. This contract gave the grantor no absolute right to reclaim the deed. It was only in case the grantee "shall refuse or neglect to comply with any of the covenants on her part agreed to be performed on her part" that the grantor could take possession of the deed. The deed, then, was an escrow, and if this plaintiff performed her part of the contract she was entitled to the possession of the deed.

This seems to answer the questions raised by appellant. The judgment of the district court is

AFFIRMED.

WILLIAM H. WALKER, APPELLANT, v. A. THOMAS KLOPP,
APPELLEE.

FILED APRIL 29, 1916. No. 18673.

1. **Negligence: VIOLATION OF STATUTE: LIABILITY.** The violation of a statute enacted for the protection of persons and their property constitutes negligence *per se*, and the violator may be required to respond in damages resultant, even though such statute be penal in its nature, and silent as to liability for damages resulting from its violation.
2. ———: **MOTOR VEHICLES: OPERATION BY MINOR: LIABILITY OF OWNER.** Section 3048, Rev. St. 1913, imposes upon owners, dealers in, and manufacturers of motor vehicles a public duty to refrain from permitting a person under 16 years of age, or an intoxicated person, to operate a motor vehicle; and when an owner of an automobile permits his minor child, under the age of 16 years, to operate his automobile, he is guilty of negligence, and is liable therefor, when the other elements of actionable negligence are present.
3. ———: ———: ———: **PERMISSION OF OWNER: EVIDENCE.** Evidence tending to prove that the defendant's minor son had frequently and for a long period of time previous to the accident, and after the accident, operated the defendant's automobile upon the streets of the city of Omaha, with the knowledge of and by permission of the defendant, is competent as proof that at the time of the accident the defendant's said minor son was operating such automobile by permission of the defendant.

APPEAL from the district court for Douglas county:
CHARLES LESLIE, JUDGE. *Reversed.*

McGilton, Gaines & Smith, for appellant.

Byron G. Burbank, *contra*.

MCGIRR, C.

The plaintiff brought this action to recover from the defendant the sum of \$6,000, as damages to the automobile and person of the plaintiff, occasioned by the reckless driving of the defendant's automobile by his son, Lester Klopp, a minor under 16 years of age. In his petition the plaintiff

alleged, in substance, that on September 20, 1913, he was driving his car toward the east on Underwood avenue, west of the village of Dundee, and that on said date Lester Klopp, a minor under 16 years of age, was driving defendant's car, with defendant's permission and consent, and negligently and recklessly, while driving said car at a speed exceeding 40 miles an hour, ran into the plaintiff and destroyed his automobile and permanently injured his person; that the damage to plaintiff's automobile was in the sum of \$1,000, and that he suffered permanent physical injuries and was thereby damaged in the further sum of \$5,000. The defendant by his answer admitted the ownership of the car, and that Lester Klopp, his son, was a minor, and denied each and every other allegation in plaintiff's petition contained. At the close of plaintiff's evidence the court, on motion, directed a verdict for the defendant. On the verdict of the jury, the court rendered judgment in favor of the defendant, and from this judgment the plaintiff appeals and asks that the judgment be reversed, on the ground that the trial court erred in directing a verdict for defendant.

The only question presented to this court for determination is whether or not the evidence is sufficient to sustain a judgment for the plaintiff. There is evidence that the defendant was the owner of a seven-passenger Olds automobile of 50-horse power; that, for a considerable period of time previous to the accident which caused the damage to the plaintiff and his property, Lester Klopp, the defendant's minor son, who was under the age of 16 years, had been driving the defendant's said automobile about the streets of Omaha, and upon other public highways, with the general permission, knowledge and consent of the defendant; that the defendant's attention had been called to the fact that, by permitting his said infant son to drive his automobile on the public highways, he was violating the law, and that he stated that he proposed to let his son drive his automobile anyway. At the time of the accident the plaintiff was driving his car toward the east on Underwood av-

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enue, and had reached a point on the intersection of Underwood avenue with the boulevard which crosses Underwood avenue, and was going at a speed of eight miles an hour. There is evidence that the defendant's son was driving the defendant's car toward the north on the boulevard at a speed of about 45 miles an hour, and collided with the plaintiff's car on the intersection; that the plaintiff's car was almost entirely destroyed, and the plaintiff and a man who was riding with him were thrown out of the car upon the ground. There is also evidence that the defendant's son had frequently, and for a long period of time previous to the accident, and after the accident, driven the defendant's automobile upon the streets of the city of Omaha, with the knowledge and permission of the defendant. This evidence was competent as proof that at the time of the accident the defendant's minor son was operating and driving defendant's automobile with the consent of and by the permission of the defendant. If the defendant, by reason of having permitted his son, who was at the time under 16 years of age, to operate and drive his automobile upon the streets and public highways, is liable to the plaintiff for the damages so sustained by him, the trial court erred in directing a verdict for the defendant. The answer to this question involves a construction of section 3048, Rev. St. 1913, which provides as follows:

"It shall be unlawful for any person under sixteen years of age, or for any intoxicated person, to operate a motor vehicle, and any owner, dealer, or manufacturer of motor vehicles who permits a person under sixteen years of age, or an intoxicated person, to operate a motor vehicle shall be deemed guilty of a misdemeanor and shall be punished as hereinafter provided for violation of the provisions of this article."

Counsel for defendant contends that it is a fundamental principle that acts penal in themselves, that is, acts creating a misdemeanor or a crime, and providing punishment therefor, shall be strictly construed, and shall not be extended beyond the strict letter and spirit thereof; that,

had the legislature contemplated anything further than punishment by a fine or imprisonment, it would have so declared in the act, by adding thereto language clearly stating that damages would follow in favor of the injured person. With this contention we cannot agree. It has been frequently and most universally held by the courts that the violation of a statute, although penal in its nature, that provides that something shall be done, or shall not be done, for the benefit of individuals, or for the benefit and protection of individuals and the public generally, is negligence *per se*, and subjects the violator of the law to liability for damages caused by a violation of such statute or ordinance.

"As a general rule it may be said that negligence may consist in the neglect of some duty imposed by statute as well as by the careless or negligent performance of some obligation imposed by law or contract. Liability for damages because of the violation of a statute or ordinance imposing some duty on a person is not affected by the fact that it is made a misdemeanor, and the fact that the statute imposes a penalty for its violation will not prevent an action for damages. In many decisions it is held that a violation of a statute or ordinance specifically imposed under the police power of the state is negligence *per se*, or as matter of law, if the other elements of actionable negligence exist." 29 Cyc. 436.

In the case of *Omaha Street R. Co. v. Duvall*, 40 Neb. 29, this court held that, as applied to the liability of street railway companies whose cars are propelled by means of electricity, the following instruction was proper: "The violation of any statutory or valid municipal regulation established for the purpose of protecting persons or property from injury is of itself sufficient to prove such a breach of duty as will sustain a private action for negligence, if the other elements of actionable negligence concur. Thus, the violation of the statutes or ordinance regulating the speed of vehicles, horses, or trains or street cars, is such a breach of duty as may be made the foundation of an action

by any person belonging to the class intended to be protected by such regulation, provided, he is specially injured thereby."

In the case of *Frontier Steam Laundry Co. v. Connolly*, 72 Neb. 767, in the opinion by Judge Letton it is said: "If the duty imposed by the ordinance is clearly intended for the protection and for the benefit of individuals or of their property, the violation of the rule prescribed tends to show negligence for which a recovery may be had; but, where the duty is plainly for the benefit of the public at large, then the individual acquires no new rights by virtue of its enactment, and a violation of the rule is of no evidential value upon the question of negligence. It is not always easy to draw the line between the two classes of enactments. In fact, in some cases their purpose is both for the welfare of the public at large and also for the protection of the personal and property rights of individuals. In such case the individual may adduce the failure to perform the duty enjoined as evidence of negligence. The rule which is applicable can only be ascertained from a consideration of the object and purpose of the enactment itself in each particular case." See, also, *Strahl v. Miller*, 97 Neb. 820.

In the case of *Hayes v. Michigan C. R. Co.*, 111 U. S. 228, the supreme court of the United States held: "If a railroad company, which has been duly required by a municipal corporation to erect a fence upon the line of its road within the corporate limits, for the purpose of protecting against injury to persons, fails to do so, and an individual is injured by the engine or cars of the company in consequence, he may maintain an action against the company and recover, if he establishes that the accident was reasonably connected with the want of precaution as a cause, and that he was not guilty of contributory negligence."

In the case of *Anderson v. Settergren*, 100 Minn. 294, the supreme court of Minnesota, in construing a statute of that state which made it unlawful for a minor under the age of 14, not accompanied by parent or guardian, to have

possession or control of firearms, and made it a misdemeanor to aid or knowingly permit a minor of such age, save in the excepted cases, to violate the same, held that a complaint, in an action to recover damages, which alleged that certain hardware merchants loaned a rifle and sold cartridges to a minor known to be only 13 years of age, and to be careless and negligent in the use of firearms, that the minor began to shoot with the gun and cartridges in every direction and damaged plaintiff, was not demurrable, and that the defendant's wrong was in law the proximate cause of the damage, despite the intervention of the minor.

The clear and unmistakable purpose of the legislature in enacting the Nebraska statute under consideration was to protect persons and property from the injury and damage that experience had shown were more likely to be occasioned by the driving of motor vehicles on the public highways by minors under 16 years of age than would be occasioned by the driving of motor vehicles by older persons of more mature judgment; and, when a person wilfully permits his minor child under the age of 16 years to drive his automobile upon the public highways in direct violation of this statute, such permission and such violation of the statute constitutes in him such negligence as is by the direct sequence of events the proximate cause of any damage that may be sustained by another to his person or property by the driving of such automobile by such minor, when the other elements of actionable negligence are established. The defendant cites a number of cases holding that the owner of a motor vehicle, or other carriage, is not liable for damages caused thereby, when such motor vehicle or carriage is driven by some one other than the owner, unless it be established that at the time the damage was occasioned the relation of either master and servant or of principal and agent existed between the owner and the driver, and that the driver was at the time engaged on the business of his master or principal. We readily agree that this is good law when the damage is caused by the negligence or carelessness of a servant or agent, and not primarily by

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reason of the violation of a statute or ordinance by the master or principal. Neither the law of master and servant nor the law of principal and agent is applicable to the instant case. When there is competent evidence of the defendant's negligence by reason of his wilful violation of the statute, and that the other elements of actionable negligence are concurrent, and also that the plaintiff has suffered some injury or sustained some damage by reason of such negligence on the part of the defendant, the case should be submitted to the jury. It therefore follows that the judgment of the district court should be reversed and the cause remanded for further proceedings.

BY THE COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings, and this opinion is adopted by and made the opinion of the court.

REVERSED.

STATE OF NEBRASKA, APPELLEE, v. CALVIN H. DODD,
APPELLANT.

FILED MAY 13, 1916. No. 18770.

PER CURIAM.

Contempt: REVIEW. A conviction under contempt proceedings can only be reviewed in the supreme court by the filing of a petition in error as in a criminal case. *Gandy v. State*, 13 Neb. 445; *Hanika v. State*, 87 Neb. 845.

APPEAL from the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Appeal dismissed.*

Albert W. Crites and Earl McDowell, for appellant.

Justin E. Porter and Allen G. Fisher, contra.

WILLIAM F. GIFT, APPELLEE, v. HENRY E. DRESS ET AL.,
APPELLANTS.

FILED MAY 13, 1916. No. 18862.

Deeds: DEEDS AS MORTGAGES: SUIT TO REDEEM: SUFFICIENCY OF PETITION. When, in an action to have two deeds, simultaneously executed by the plaintiff, running to two different grantees, who are made defendants, decreed to be mortgages, the petition contains allegations that the execution and delivery of the deeds were induced by the defendants working in concert, it will be held good against a demurrer alleging misjoinder of parties, and that several causes of action are improperly joined.

APPEAL from the district court for Logan county: HANSON M. GRIMES, JUDGE. *Affirmed.*

Frank E. Beeman and Henry E. Dress, for appellants.

W. E. Hill and Beeler & Crosby, contra.

MORRISSEY, C. J.

Plaintiff brought his suit in equity in the district court for Logan county to have two certain deeds which he had executed to the defendants decreed to be mortgages, and for permission to redeem from the liens of these mortgages. To this petition defendants filed separate demurrers, alleging misjoinder of parties defendant, that several causes of action were improperly joined, and that the petition does not state facts sufficient to constitute a cause of action.

The petition is very long and it would serve no useful purpose to set it out verbatim. It alleges that defendant Dress is a practicing attorney, and that plaintiff employed him to defend him against a certain criminal prosecution for a fee of \$250; that to secure the payment of this money plaintiff executed and delivered to Dress a mortgage on a tract of land in Logan county, which plaintiff then owned; that thereafter Dress represented to plaintiff that certain

incriminating evidence would be given against him, and that it would be necessary to obtain a large sum of money to make a defense; that the defendant Carr would furnish the necessary money, provided plaintiff gave ample security therefor, and proposed to plaintiff that the mortgage which he had theretofore taken be released, and he executed a release; that in truth the county attorney had already determined to dismiss the felony charge which was pending against plaintiff herein because of lack of evidence to sustain the same, and, in compliance with an arrangement made between the county attorney and this plaintiff, plaintiff entered a plea of guilty to two misdemeanors, on which the fines and costs amounted to \$225; that the defendant Carr advanced \$250, out of which plaintiff paid said fines and costs; whereupon plaintiff, relying upon representations, which are set out in detail in the petition and alleged to be false and fraudulent, made by the defendant Dress with the knowledge and connivance of the defendant Carr, executed and delivered the deeds now asked to be decreed to be mortgages. It is alleged that the two defendants conspired together for the purpose of securing these deeds with the intention of defrauding the plaintiff of his land; that the land is worth much more than the indebtedness, and there is a prayer that the deeds be decreed to be mortgages and that the plaintiff be allowed to redeem therefrom.

It may be that the petition contains unnecessary allegations and sets out details of the transactions which are not required in a pleading of this kind, but this does not make it vulnerable to a demurrer. Defendants urge especially that there is a misjoinder of defendants, in taking title by two separate and distinct instruments of writing, but the petition expressly alleges that these two defendants conspired together to secure these two deeds and pleaded such facts as makes the act of one the act of the other. The parties are no differently situated from what they would be had they taken a joint deed to the whole property. Taking the allegations of the petition as true,

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the defendants were acting in concert, and it was proper to join them in a single suit. No error is found in the ruling of the court, and the judgment is

AFFIRMED.

SEDGWICK, J., not sitting.

WILLIAM NIKLAUS, TRUSTEE, APPELLEE, v. GEORGE F. LESSENHOP ET AL., APPELLANTS.

FILED MAY 13, 1916. No. 18892.

1. **Bankruptcy:** SALES IN BULK: CREDITORS' SUIT. A trustee in bankruptcy may maintain an action in the nature of a creditor's bill against the persons who have purchased and disposed of the entire assets of his bankrupt's estate in violation of the provisions of section 2651, Rev. St. 1913, commonly called the "Bulk Sales Law."
2. ———: ———: ———: MEASURE OF RECOVERY. In such case the liability of the defendants is not measured by the amount they received for the goods, but is measured by the agreed inventory value thereof.
3. **Sales.** The "Bulk Sales Law" was held valid and constitutional in *Appel Mercantile Co. v. Barker*, 92 Neb. 669, and we adhere to that decision.
4. **Evidence examined,** and *held* that the decree was not excessive.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

T. J. Doyle, for appellants.

Mockett & Peterson and Burkett, Wilson & Brown, contra.

BARNES, J.

William Niklaus, as trustee of the bankrupt estate of the Lincoln Implement & Transfer Company, commenced this action in the nature of a creditor's bill in the district

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court for Lancaster county against George F. Lessenhop, Isaac Deardorf, Charles W. Wingard, Joseph Miller and John M. Lindsey, to recover judgments for the conversion of assets of the bankrupt estate. The several defendants filed separate answers, to which replies were filed, and on the issues thus joined a trial was had to the court, which resulted in judgments in favor of the plaintiff and against the defendants as follows: Charles W. Wingard, \$3,140, with interest from May 20, 1911, amounting to \$643.53; against Joseph Miller for \$2,500, with interest amounting to \$512.36; against John M. Lindsey for \$1,003, with interest amounting to \$205.56; against Isaac Deardorf in the sum of \$8,004.45, with interest from May 20, 1911. All of said judgments carried costs, and represented the amount of the assets converted by each of the said defendants. The court further found for the defendant George F. Lessenhop and dismissed the action as to him. From the several judgments, defendants, with the exception of Lessenhop and Lindsey, have appealed.

The record discloses that the Lincoln Implement & Transfer Company was duly adjudged a bankrupt, and the plaintiff in this action was appointed as trustee in bankruptcy; that before the implement company was adjudged a bankrupt, and on or about the 9th day of May, 1911, the defendant George F. Lessenhop executed a bill of sale of the entire stock of the bankrupt concern to the defendant Isaac Deardorf and transferred and assigned to him the entire amount of the capital stock of the implement company. The agreed inventory of stock amounted to \$11,000. It appears that Lessenhop had, previous to that date, acquired all of the capital stock of the implement company, and was its president, and had full control of the affairs of the company; that at the time the bill of sale was executed and the stock of the implement company was assigned to Deardorf the company was insolvent and was indebted to a large number of creditors to the amount of \$11,705.11. The testimony also shows that when the bill of sale and assignment of the capital stock was exe-

cuted Lessenhop claims Deardorf assumed the debts of the company. Within ten days after Deardorf received the bill of sale and assignment, he sold and delivered to Charles W. Wingard a part of said stock of implements of the value of \$3,140; that he sold and delivered to Joseph Miller \$2,500 worth of said stock; that he sold to John M. Lindsey \$1,003 worth of said stock; that he sold other small amounts of the stock at retail, and within the time last above mentioned all of the assets of the company had been sold and been shipped out of Lincoln to different parts of the country; that no part of the stock itself had been found or accounted for. The testimony shows without dispute that the sale of the assets of the implement company was made to Deardorf in violation of section 2651, Rev. St. 1913, commonly known as the "Bulk Sales Law;" that no notice was given to the creditors of the bankrupt, and in the sales from Deardorf to Wingard, Miller and Lindsey the provisions of the "Bulk Sales Law" were wholly disregarded. In fact the testimony shows without dispute that Deardorf and the other judgment defendants converted the entire assets of the bankrupt to their own use in utter disregard of the provisions of the statutes.

Appellants contend that, because the Lincoln Implement & Transfer Company by its charter was authorized to do both a wholesale and retail business, the "Bulk Sales Law" has no application to this case, and that the assets of the company sold in violation of the provisions of the section above mentioned are not trust funds. There are some adjudications in other jurisdictions which seem to sustain this contention; but, in construing the section of the statute above mentioned, we held in *Appel Mercantile Co. v. Barker*, 92 Neb. 669, that: "One who obtains possession of a stock of merchandise pursuant to a purchase thereof in bulk, in violation of the statute, will be held to be a trustee for the benefit of the creditors of his vendor, and liable as garnishee." In *Kohn v. Fishbach*, 36 Wash. 69, it was held: "One who buys a stock of merchandise in bulk, without complying with the statute requiring him to demand

a list of the vendor's creditors and to see that the purchase price is applied to their payment, holds the property in trust for such creditors, and is liable to them in an action of garnishment, although he is not indebted to the vendor and has disposed of the goods." The same rule was applied in *Jaques & Tinsley Co. v. Carstarphen Warehouse Co.*, 131 Ga. 1. We think the rule is that the defendants are liable for the violation of the "Bulk Sales Law," and their liability is not measured by the amount they receive for the goods, but must be measured by the agreed value thereof. *Hargreaves Mercantile Co. v. Tennis*, 63 Neb. 356.

Appellants are liable for other reasons than the "Bulk Sales Law." Deardorf obtained the transfer of the goods without paying any money, and knew of the indebtedness of some \$9,000 or \$10,000, and in taking over the business, although he claims he did not assume any liability to the creditors, the record discloses that he gave no attention or consideration whatever to the liabilities of the Lincoln Implement & Transfer Company. Such being the case, he must be held to have entered into a transaction, the effect of which was to hinder, delay and defraud the creditors of that company. Miller obtained his share of the stock of goods without any concern as to the creditors. The same may be said of Wingard and Lindsey. Their purchases were in violation of the "Bulk Sales Law," and therefore they are each liable for the amount of the goods purchased and converted by them. They acted without regard to the rights of creditors, and therefore, to say the least, they participated in hindering and delaying the creditors of the Lincoln Implement & Transfer Company. The transaction must be held fraudulent as to all of the defendants. It is also contended that the "Bulk Sales Law" is unconstitutional. That question was before the court in *Lee v. Gillen & Boney*, 90 Neb. 730. The law was there assumed to be constitutional and valid. The question of the validity of the law was directly passed upon in *Appel*

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Mercantile Co. v. Barker, supra, where it was held to be in all respects constitutional.

It is finally contended that the decree is grossly excessive and is not supported by the evidence. The record discloses, however, that when Deardorf purchased the assets of the implement company an inventory was taken and the value of the stock was agreed upon between the purchaser and the vendor. Deardorf conveyed certain property to Lessenhop in payment, the value of which he claimed was largely in excess of the amount of the inventory. When he sold the property to the other defendants, he obtained the inventory price of the same. The amount of the decree as to the several defendants is well within the inventory of the assets of the implement company. Therefore defendants' contention cannot be sustained.

As we view the record, the judgment of the district court was right, and is

AFFIRMED.

LETTON and SEDGWICK, JJ., not sitting.

STATE, EX REL. WILLIS E. REED, ATTORNEY GENERAL, RELATOR, V. GARDEN COUNTY ET AL., RESPONDENTS.

FILED MAY 13, 1916. No. 19387.

Counties: BOUNDARIES: WRIT OF OUSTER: SUFFICIENCY OF ANSWER.
Pleadings examined, the substance of the answer set out in the opinion, and held to be sufficient to resist a general demurrer.

Original application for writ of ouster. Demurrer to answer. *Demurrer overruled.*

Willis E. Reed, Attorney General, George W. Ayres, W. H. Thompson, A. D. Fetterman and D. F. Osgood, for relator.

H. J. Curtis, contra.

BARNES, J.

This is an original application in this court on the relation of the attorney general to obtain a writ of ouster against the county of Garden and its officers, commanding them to refrain from exercising jurisdiction and dominion over a strip of land alleged in the information to be and constitute a part of Grant county in this state.

The information, after setting forth the several acts of the legislature passed from time to time defining the boundaries of Garden, Grant and several other counties out of which Grant and Garden counties have been formed, alleged, in substance, that the twenty-fifth degree of longitude west from Washington constitutes the west boundary line of Grant county and the east boundary line of Garden county; that if the east boundary line of Garden county, as defined and described by the several acts of the legislature, set forth in the petition, overlaps the west boundary line of Grant county, then such acts are illegal and void; that the officers of Garden county are claiming and exercising jurisdiction over the said territory which overlaps the west boundary line of Grant county. The petition concludes with a prayer for a writ of ouster and such other and further relief as may be just and equitable.

To the petition for the writ the respondents have filed an answer denying the material allegations on which the relator relies. Further answering the respondents allege: "(6) That at the time of the formation of the county of Cheyenne the twenty-fifth degree of longitude west from Washington was unlocated and unmarked along or near said county except at one point at the northeast corner of the state of Colorado, and that said degree was never located and marked on the earth between the fifth and sixth standard parallels, which are respectively the southern and northern boundaries of the county of Grant, until the year 1912; that when the original government land survey was made in or about the year 18—of the lands in townships twenty-one (21), twenty-two (22) and twenty-three (23)

north, range forty-one (41) west of the sixth P. M., it was generally believed that the range line between said ranges 40 and 41 west of the sixth P. M. along said townships was on about the same line as the said twenty-fifth degree of longitude west from Washington; and the officers of the state of Nebraska and the county of Cheyenne and its officers recognized and claimed said range line between the fifth and sixth standard parallels as the east boundary line of the county of Cheyenne, and said range line was recognized and accepted as the eastern boundary of Cheyenne county by all persons residing in the vicinity of said boundary, and Cheyenne county at all times assumed and exercised jurisdiction and control of all matters pertaining to the territory immediately west of said range line; that from and after the organization of the county of Deuel the officers of the state of Nebraska and the officers of Deuel county and the persons residing in said locality recognized and claimed the said range line between ranges forty and forty-one between the fifth and sixth standard parallels as the east boundary line of Deuel county, and until the year 1910 the county of Deuel and its officers had authority and control of said strip of land and the personal property thereon for all judicial, legislative and revenue purposes, and that from and after the organization of the county of Garden said county and its officers have claimed and exercised authority and control in all matters in and pertaining to the above-mentioned strip of land immediately west of said range line, and the officers of the state of Nebraska have recognized said range line as the east boundary line of Garden county, and its predecessors, up to and until the year 1915, and the people residing in the immediate vicinity have recognized said range line as the east boundary line of Garden county and its predecessors.

“(7) That when the county of Grant was formed by legislative act, in the year 1887, and the western boundary described as extending south from a point on the eastern boundary of Sheridan county ‘along the east boundary of

Cheyenne county to the south line of township twenty-one, range forty,' the said east boundary line of Cheyenne county was the range line between ranges forty and forty-one, and the legislature intended to make and did make the west boundary line of Grant county a straight line from a point on the east boundary line of Sheridan county, said east boundary line being the range line between ranges forty and forty-one, to the southwest corner of township twenty-one, range forty west of the sixth P. M.

"(8) That from the time of the organization of the county of Grant until about the year 1912 the officers and representatives of said county recognized the said range line between forty and forty-one as the western boundary of said county, and neither claimed nor exercised authority or control west of said range line until about the year 1912, since which time Grant county and its officers have interfered to some extent with the due and legal control and authority of Garden county and its officers over and pertaining to the citizens, lands and property in said strip of land immediately west of said range line between ranges forty and forty-one.

"(9) That the act of the legislature of 1895, quoted in the information, did not change the boundary line between Deuel and Grant counties, but gave legislative recognition to the boundary line theretofore established and marked on the ground on the range line between ranges forty and forty-one in the manner as hereinabove set forth, and recognized by the officers of the state of Nebraska, and the officers of all the said counties, and by the inhabitants of the said vicinity."

The answer concludes with a prayer that the information be dismissed; that respondents go hence without day and recover their costs therein expended.

To this answer relator has filed a general demurrer, and on the argument, and in his brief, contends that the facts stated in the answer constitute no defense to the facts alleged in relator's petition.

On the other hand, the respondents contended, both in their brief and on the oral argument, that the facts set forth in the answer are a defense to the information and are sufficient to require the taking of testimony to determine the true boundary line between the counties. In support of their contention respondents cite the cases of *Virginia v. Tennessee*, 148 U. S. 503, and *Edwards County v. White County*, 85 Ill. 390. In the case last cited it was said: "If the language of the statute were more ambiguous than we conceive it to be, it would still be competent, in solving the doubt, to consider the acts of the public authorities in recognition of the boundary line; and, upon principles of public policy, where, as here, courts, assessors and collectors of taxes, and other officers having duties, limited to the respective counties, to perform, have, for a long time, recognized and acted upon the assumption that a given line is the true boundary line between the counties, we shall not inquire whether, in the first instance, the line was the one intended or not. The quiet and good order of communities ought not to be disturbed by controversy in regard to such questions, after, at least, the expiration of the period fixed for the limitation of actions between individuals where title to real estate is controverted; and this, not because in such a controversy counties are necessarily within the contemplation of the statute of limitations, but because the public welfare forbids that the possibility of strife and controversy in regard to boundary lines between counties should continue indefinitely."

If the governing authorities, the landowners and the public in general have for more than ten years recognized a definitely located line as the boundary between their counties, so that county assessors and collectors of taxes, and other officers having duties limited to the respective counties to perform, have, for a long time recognized and acted upon the assumption that a given line is the true boundary line between counties, these facts are very important in this case. They should be more definitely

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pleaded. The answer seems sufficient to resist a general demurrer.

The demurrer is therefore overruled, and the parties are allowed to amend their pleadings, if so advised.

DEMURRER OVERRULED.

HARRY R. WARD, APPELLANT, v. BANKERS LIFE COMPANY
ET AL., APPELLEES.

FILED MAY 13, 1916. No. 18917.

1. **Judgment: VALIDITY: JURISDICTION.** In a suit on an insurance policy naming a trustee for insured's minor son as beneficiary, the guardian of the latter being plaintiff and the insurer and the trustee holding the insurance contract being defendants, a judgment ordering the trustee to deliver the policy to plaintiff and requiring insurer to pay the insurance to plaintiff upon surrendering the policy is void as to the trustee, if based alone on service outside of the state, though insurer offered to pay into court the fund in controversy.
2. **Insurance: ACTION ON POLICY: PARTIES.** A trustee for the minor son of insured, when thus designated in a life insurance policy as beneficiary, is the proper party to maintain an action for the unpaid insurance. Rev. St. 1913, secs. 7582, 7585.
3. ———: ———: **ATTORNEY'S FEES.** The statute allowing plaintiff a reasonable sum as an attorney's fee in an action to recover insurance is applicable to contracts executed before its enactment. Rev. St. 1913, sec. 3212.

APPEAL from the district court for Douglas county:
ABRAHAM L. SUTTON, JUDGE. *Reversed.*

Carl E. Herring, for appellant.

I. M. Earle, John H. Grossman and I. N. Flickinger,
contra.

ROSE, J.

This is an action on a life insurance policy. The insured, Nevada O. Ward, died August 8, 1912, the amount due the beneficiaries being \$2,030. When executed, the policy was payable to Mary E. Ward, the wife of insured, but it was changed July 19, 1911, for the benefit of their two sons, one-half of the insurance being payable to Lawrence Ward, and the remainder to plaintiff in trust for Elmer B. Ward, a minor. The insurer paid to Lawrence Ward the amount due him on the policy. The remainder of the insurance is the subject of litigation between the mother as guardian and the plaintiff as trustee. In the probate court of Pottawattamie county, Iowa, Mary E. Ward was appointed guardian of her minor son, Elmer B. Ward, and in the district court for that county instituted an action against the insurer and the plaintiff herein to collect the remainder of the insurance due, on the theory that the trust was passive and that the legal title to the insurance vested in the minor upon the death of the insured. In its answer the insurer offered to pay into court the amount due on the policy. A summons issued from the Iowa court was served on plaintiff in Omaha, Nebraska, but he made no appearance in that tribunal. A judgment therein directed plaintiff herein to surrender and deliver to Mary E. Ward the insurance certificate held by him, and allowed a recovery of \$1,015 from the insurer upon surrender of the certificate. In the district court for Douglas county the present suit was brought by Harry R. Ward, as trustee, to recover from the insurer for the benefit of the minor the remainder due on the policy. In this action Mary E. Ward intervened and pleaded the Iowa judgment as a bar, alleging that plaintiff herein was trustee representing a mere passive trust, and that she was guardian of Elmer B. Ward, the beneficiary of the trust. From a judgment in favor of defendant and intervener, plaintiff has appealed.

Plaintiff contends that the Iowa court had no jurisdiction to enter the judgment rendered. Intervener argues

that, since the insurer, by its answer, offered to pay the money into the Iowa court, that tribunal had jurisdiction of the *res*, and that the constructive service was sufficient. The law seems to be that the action was not *in rem*, and that in the absence of a valid personal service or an appearance the Iowa court was without jurisdiction to render judgment against the trustee. *Cross v. Armstrong*, 44 Ohio St. 613; *Washington Life Ins. Co. v. Gooding*, 19 Tex. Civ. App. 490.

It is argued that the tender made by the insurer conferred upon the Iowa court the same jurisdiction it would have acquired had the fund been impounded by garnishment. *Mooney v. Union P. R. Co.*, 60 Ia. 346. In the case cited a debt owing by a railroad company to an employee in Nebraska had been garnished in Iowa. There was service by publication. It was held that the debt was property of the nonresident within the jurisdiction of the Iowa court and that constructive service could be based thereon. In the case which intervener brought in Iowa, plaintiff herein made no claim to any specific real or personal property in Iowa. There was no debt owing to him by a resident of that state, if intervener's contention upon the merits was well founded. It was not an action to impound a debt owing to a nonresident, but an action to obtain an adjudication that there was no debt owing to him. *Cross v. Armstrong*, 44 Ohio St. 613.

Is the trustee the proper plaintiff? The insurance was payable one-half to Lawrence Ward and the remainder to plaintiff in trust for Elmer B. Ward. It is insisted by intervener that there were no duties to be performed by the trustee; that the trust was passive; that the legal title to the fund vested at once in the beneficiary, and that as his guardian the intervener is entitled to the insurance. The statute of uses did not apply to a trust in personal property, and consequently the legal title thereto did not vest in the *cestui que trust*. *Denton v. Denton*, 17 Md. 403; *In re Hagerstown Trust Co.*, 119 Md. 224; *Ure v. Ure*, 185 Ill. 216; *Smith v. Smith*, 254 Ill. 488; *Rust v. Evenson*, 161

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Wis. 627. While it has been held that the statute of uses was not adopted in this state, equity has power to compel the trustee of a passive trust to transfer the property to the *cestui que trust*. *Hill v. Hill*, 90 Neb. 43. That has not been done. Plaintiff was the proper party to maintain this action. While the statute requires every action to be brought in the name of the real party in interest, it also provides that the trustee of an express trust may sue without joining with him the person for whose benefit the action is prosecuted. Rev. St. 1913, secs. 7582, 7585.

On the record presented the trustee was the proper plaintiff and was entitled to judgment. He made application to the district court for a reasonable sum as an attorney's fee. Rev. St. 1913, sec. 3212. The insurer has not been neutral in the litigation, but has resisted the claim of plaintiff. It has been shown that \$100 would be a reasonable attorney's fee, and it should be allowed, though the statute authorizing it was enacted after the insurance policy was executed. *Nye-Schneider-Fowler Co. v. Bridges, Hoyer & Co.*, 98 Neb. 863.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

LETTON, J., not sitting.

SEDGWICK, J., not participating.

GIOVANNA BUTERA, APPELLEE, v. J. C. MARDIS COMPANY ET AL., APPELLANTS.

FILED MAY 13, 1916. No. 18557.

1. **Statutes: CONSTITUTIONALITY: ACT FOR PROTECTION OF LABORERS.** The act of 1911 (Laws 1911, ch. 65), "providing for the protection and safety of persons in and about the construction, repairing, alteration or removal of buildings, bridges, viaducts and other structures," is not void as in violation of the constitution.

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2. **Master and Servant: ACT FOR PROTECTION OF LABORERS: VIOLATION: PERSONS LIABLE.** The intention of the legislature was to make all those liable for damages caused by a violation of the statute through whom the negligent party defived the right to perform the service; that is, all those who made his employment possible. This would include the owner of the real estate who originated and authorized the improvement.
3. ———: ———: ———: **GROSS NEGLIGENCE.** A palpable violation of the statute by the employer is gross negligence.
4. ———: ———: ———: **CONTRIBUTORY NEGLIGENCE.** The defense of contributory negligence still exists in actions for damages caused by a violation of the statute, but employees are not required to anticipate that their employers will fail to perform the duty imposed upon them by the statute.
5. ———: **ACTION FOR DEATH: FINDINGS: SUFFICIENCY OF EVIDENCE.** The evidence justifies the finding of the jury that the defendant violated the statute, and that the deceased was not guilty of contributory negligence.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Affirmed.*

Brogan & Raymond and John W. Parish, for appellants.

Gurley, Woodrough & Fitch, contra.

William R. Patrick and C. J. Southard, amici curiæ.

SEDGWICK, J.

The defendant, the J. C. Mardis Company, contracted to erect a building called the "Flat Iron Building" on a lot of the defendant, Sterling Realty Company, in Omaha. The deceased was in the employ of the Mardis Company and was killed by the fall of a load of material suspended by means of a derrick or crane over the walk. His widow, Giovanna Butera, brought this action for damages, and recovered judgment in the district court for Douglas county against the J. C. Mardis Company and the Sterling Realty Company, jointly. The defendants have appealed separately.

The Sterling Realty Company contends that the statute, so far as it makes the owner of the lot on which the build-

ing was being erected liable, is unconstitutional. Sections 3602, 3612, Rev. St. 1913, provide as follows:

Section 3602. "All scaffolds, hoists, cranes, stays, ladders, supports or other mechanical contrivances, erected or constructed by any person, firm or corporation in this state, for the use in the erection, repairing, alteration, removal or painting of any house, building, bridge, viaduct or other structure, shall be erected and constructed, in a safe, suitable and proper manner, and shall be so erected and constructed, placed and operated as to give proper and adequate protection to the life and limb of any person or persons employed or engaged thereon, or passing under or by the same, and in such manner as to prevent the falling of any material that may be used or deposited thereon."

Section 3612. "For any injury to person or property, occasioned by any violation of this article, or failure to comply with any of its provisions, a right of action shall accrue to the party injured, for any direct damages sustained thereby; and in case of loss of life by reason of such violation or failure, as aforesaid, a right of action shall accrue to the widow of the person so killed for the benefit of herself and the children or adopted children of the person so killed. * * * In case the person or persons so killed shall leave a widow surviving, the action shall be brought in her name for the benefit of herself and children, if any surviving. * * * The fact that any employee, servant or other person shall continue to work during the time such owner, contractor or subcontractor has failed to comply with the provisions of this article shall not be considered as an assumption of the risk of such employment by such employee, servant or other person and shall not in any case bar recovery of damages for the failure of such owner, contractor or subcontractor to comply with the provisions of this article. In all actions brought to recover damages for injuries caused by a failure to comply with the terms and provisions of this article the owner, contract-

or or subcontractor, if any, shall in all cases be jointly and severally liable in damages for all injuries caused through a failure to comply with this article. The owner, contractor and subcontractor, if any, shall in all cases be jointly and severally liable in damages for all injuries caused through a failure to comply with this article. The owner, contractor and subcontractor, if any, shall in all cases be held liable for the failure or neglect of any superintendent, foreman or other agent, employed by them, or either of them, to comply with the provisions of this article: Provided, however, the provisions of the foregoing article shall not apply to any buildings which do not exceed 33 feet in height above the foundation."

It appears to be conceded that the Sterling Realty Company was the owner of the lot and contracted with the Mardis Company to erect the building thereon. It is contended that "there were no contractual relations between the Sterling Realty Company and John Butera. It is not claimed that the Sterling Company committed any act which contributed to the death of said Butera." The court instructed the jury that, if the contractor was liable, "the Sterling Realty Company, as owner, would be jointly and severally liable." This seems to be fully warranted by the language of the statute. "The owner, contractor and subcontractor, if any, shall in all cases be held liable for the failure or neglect of any superintendent, foreman or other agent, employed by them, or either of them, to comply with the provisions of this article." In contending that this provision of the statute is unconstitutional, this defendant relies upon *Camp v. Rogers*, 44 Conn. 291, and *Daugherty v. Thomas*, 174 Mich. 371.

The nature of the action is thus stated in *Camp v. Rogers, supra*. "The statute (Gen. Statutes, p. 234, sec. 21) provides that the driver of any vehicle, meeting another on the public highway, who shall neglect to turn to the right, and thereby drive against the vehicle so met and injure its owner, or any person in it, or the property of any person, shall pay to the party injured treble damages; and

that 'the owner of the vehicle so driven shall, if the driver is unable to do so, pay such damages, to be recovered by writ of *scire facias*.' " The court said: "If the construction for which the plaintiff contends should be given to the statute upon which her right to recover must depend, then there can be no case in which the owner of a vehicle would not be liable, not only for the actual damage caused by a violation of the statute on the part of any person driving it, but for the threefold and punitive damages given by the statute against the driver. If the owner of a vehicle should leave it, with his horse attached to it, at a post by the side of the street, and in his absence a thief or trespasser should take it, and by reckless driving damage a horse or carriage that he happened to meet, the owner would be liable. So if one lends his vehicle to a friend, and he again lends it to a stranger, the owner would be liable, not only for any damage done by the stranger in driving it, but even by the servant of the stranger. Indeed, we should have this strange anomaly—that my neighbor borrows my carriage and is riding in it with his servant and the latter wilfully neglects to turn to the right and injures a team that he meets, while my neighbor would not be liable as master, because the act of his servant was wilful, I should yet be liable as owner, and too with no right to indemnity from the master." The court "held that, by the word 'owner' in the last clause, the person in control of the vehicle, either mediately or immediately, was intended, and not necessarily the actual owner. Any other construction would make the owner of a vehicle liable for the acts of a person in possession of it, over whom he had no control and to whom he did not stand in the relation of master or principal." We have no criticism on this conclusion of that court. This reasoning will not so readily apply to our statute. When the owner of real estate makes a contract for building thereon, he can in that contract protect himself against any misconduct or neglect of the contractor and can require such guaranty as he deems necessary for his protection. If this statute affects the right of free contract, or if

the public benefit that comes from protecting laboring men against the dangers of their employment will not justify such legislation, such questions of public policy, if doubtful in their application, are for the legislature, and not for the courts. We conclude that this legislation does not violate our fundamental law.

It is suggested in the briefs that the word owner should be construed to apply to the contractor himself while he is in the exclusive possession and control of the building in process of construction, and not to the owner of the real estate until the completed building is delivered to him pursuant to the contract. The statute makes both the owner and contractor liable for the neglect of the subcontractor and "for the failure or neglect of any superintendent, foreman or other agent, employed by them, or either of them." It could not be intended that a subcontractor, for instance a plumber, who would contract to furnish the plumbing of the building should be considered the owner. The intention plainly was to make all those liable through whom the negligent party derived the right to perform the service; that is, all those who made his employment possible. This would include the owner of the real estate who originated and authorized the improvement.

The plaintiff could not maintain the action in her own name under sections 1428, 1429, Rev. St. 1913, which provide that such action must be brought in the name of the administrator. The defendants insist that the petition fails to state a cause of action under the act of 1911, Rev. St., secs. 3602, 3612. The petition alleges the negligence of the defendants as follows: "Plaintiff alleges that, while the said John Butera was so engaged in walking across said sidewalk and into the street adjacent, the said crane and mechanical contrivance was not so operated by said J. C. Mardis Company as to give proper and adequate protection to the life and limb of persons passing under or by the same, including said John Butera, but, on the contrary, was so operated and in such a manner as to cause the load and material and hook attached to the said crane to fall

and strike and swing upon and against the head and body of said John Butera with such force and violence that he was crushed to the ground and killed; that the particular respects in which the said crane was so operated as not to give proper and adequate protection to the life and limb of persons passing under or by the same, including the said John Butera, and to prevent the material and load attached to the said crane from falling upon such persons, are more fully set out as follows, to wit: Plaintiff alleges that in the operation of said crane the J. C. Mardis Company caused a heavy load of material, upwards of two thousand pounds or more, to be lifted by said crane from the roof of the building and suspended over the public street and sidewalk to the north of said building; that the said street and sidewalk were at the time wholly unguarded by said defendant, and were open to and in constant use by workmen engaged in and about said building; that the said crane and mechanical contrivance was not in a suitable or proper condition to handle such a load as was attached thereto, but by reason of frost upon the brakes and drum and tackle of said derrick, the load was very liable to slip and fall or drop upon the said public sidewalk and street; that the employees of the defendant, the J. C. Mardis Company, who were employed to operate said crane, to wit, one Robert B. Wartnaby and Harry Reuben, were not competent or skilled in the operation thereof; that said Robert B. Wartnaby was employed by defendant to run the said steam engine, derrick and mechanical contrivance, and said Harry Reuben was employed to attend to the guide ropes upon said crane; that said Harry Reuben was a carpenter, and was not experienced or qualified to attend to said crane; that said Robert B. Wartnaby was a superintendent or foreman of said building and a carpenter by trade, and was not experienced or qualified to manage or operate said engine, boiler, crane and mechanical contrivance. That after said heavy load had been attached to said crane, the defendant, the J. C. Mardis Company, acting through its said servants, caused and

permitted the said load to fall and slip and to descend with great rapidity in such manner as to be out of control of the persons operating the crane and engine, and to drop and fall upon said John Butera upon the sidewalk and street adjacent to said building, and without giving any warning to any of the persons upon said sidewalk or street, including said John Butera, concerning the said operation of said crane, and without making any provision whatever for the protection of persons passing upon said sidewalk and street, including said John Butera." This paragraph originally contained allegations of an ordinance of the city of Omaha, which upon motion of defendants were stricken from the petition.

Defendants also insist that the evidence shows conclusively that the deceased was guilty of contributory negligence which would prevent the recovery. The argument seems to be that the deceased might have taken a different route, and that it was not necessary that he should pass along the walk under the derrick as he did, and that the noise of the derrick and of the engine which was operating it was such as to notify the deceased that it was dangerous to pass under it. The question of contributory negligence on the part of the deceased appears to have been fairly submitted to the jury, and we cannot say that the verdict in that respect is so clearly contrary to the evidence as to require a reversal. The statute requires the contractor and persons in charge of the building operations to so construct and operate the same as to give proper and adequate protection to employees. The deceased was not required to anticipate that this duty would be neglected, and the evidence in regard to the operation of the derrick at the time is not of such a nature as to convict the deceased of wilful or gross negligence in passing by the ordinary way in the performance of his duty. A palpable violation of the statute by the employer is gross negligence. The jury might find from the evidence that the negligence of the employer was such a violation of the statute.

The supreme court of Wisconsin in *Koepp v. National Enameling & Stamping Co.*, 151 Wis. 302, in construing a similar statute borrowed from New York, quotes from a decision of the New York court (*Gombert v. McKay*, 201 N. Y. 27), in which it was said: "It (their statute), in terms, absolutely forbids those employers to furnish or operate, or cause to be furnished or operated, any apparatus therein mentioned of the character and quality described by it. It, in its effect, provides that any employer who, either personally or by another, furnishes for the performance of any named labor a forbidden article shall be responsible therefor. The duty of the employer created by it is personal, incapable of delegation, and unaffected by caution and discrimination in selecting employees for their prudence and competency." It also quoted from another New York case (*Smith v. Variety Iron & Steel Works Co.*, 147 App. Div. (N. Y.) 242): "The defendant is not held liable for injuries to its workmen occasioned without any fault upon its part. It was at fault in furnishing a scaffold which was not safe, as the statute required it to do. While the scaffold appeared to be safe it was, in fact, insecure. Under the law the employer became responsible for the safety of the scaffold when he directed the workmen to use the scaffold." The Wisconsin court adds: "So it must be held that the legislature intended to make employers, in the situations dealt with by the statute, absolute insurers of the safety of their employees, save in cases of efficient assumption of the risk or contributory negligence."

The statement that the law makes employers "absolute insurers of the safety of their employees" was criticised by some members of the court, and the author of the opinion explained this language in a later case: "That does not mean that the place of employment must be so safe that an employee cannot become injured. The statute makes the employer an insurer as to furnishing such a place as it requires, but not against injury to employees using the place which has been so furnished. * * * Unsafe or

improper conditions are the opposites of safe, suitable, and proper. Safe and proper in that there is no such danger as that which the statute was intended to obviate, within reasonable apprehension. Safety as regards all reasonable probabilities not all possibilities of personal injury. Safe, suitable, and proper, so far as human foresight devoted to the matter, not with ordinary attention merely, but with a purpose to accomplish just what the legislature intended, a place so safe as to render personal injury so remote as to be, at most, merely within the realm of possibility." *Kendzowski v. Wausau Sulphate Fibre Co.*, 156 Wis. 452. This explanation seems to have had the approval of all the court except one judge. The expression, "a place so safe as to render personal injury so remote as to be, at most, merely within the realm of possibility," does not seem to be quite accurate. Possibility is a broad expression. It would seem to require a place so safe that an employee might not be injured by his own gross or even reckless negligence. No doubt the intention of the statute is that the employer is to be an "insurer as to furnishing such a place as it requires." The employee may confidently rely upon the performance of this duty by his employer, and he cannot be held guilty of negligence in acting upon the supposition that the employer has fully complied with the statute. To this extent the statute affects the doctrine of contributory negligence. Our statute expressly provides: "The fact that any employee, servant or other person shall continue to work during the time such owner, contractor or subcontractor has failed to comply with the provisions of this article shall not be considered as an assumption of the risk of such employment by such employee, servant or other person and shall not in any case bar recovery of damages for the failure of such owner, contractor or subcontractor to comply with the provisions of this article."

The noise of the derrick just before the falling of the materials was perhaps unusual. It may be that an expert in the handling of such machinery would have known that there was danger. But the evidence does not show any

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such warning to the deceased under the circumstances as would require the court to say as matter of law that he was guilty of such negligence as to preclude a recovery. The deceased had no knowledge as to the construction and use of the derrick. He was performing his duty under the instructions of his employer. He took the ordinary passageway, without any responsibility for the operation of the derrick. The derrick was so constructed, and it was operated in such a way, that the materials with which it was loaded fell upon the deceased. The facts will support the finding of the jury that the employer violated the statute.

The defendants have assisted us with an interesting and complete brief upon the general subject and scope and construction of the statute. In the view that we have taken of the purpose and meaning of the statute, and the public policy it indicates, we cannot say that there is any error in the record requiring a reversal.

AFFIRMED.

LETON and HAMER, JJ., not sitting.

ROSE, J., dissents.

CHARLES F. DRYDEN, APPELLEE, v. PERU BOTTOM DRAINAGE DISTRICT, APPELLEE; JOHN MULHALL, INTER-VENER, APPELLANT.

FILED MAY 13, 1916. No. 18616.

1. **Landlord and Tenant: LEASE: CONSTRUCTION.** A landlord whose contract with his tenant is that he shall be paid a specified number of bushels of corn as rent, and shall have a lien upon the crop to secure the payment of such rent, and shall be notified when the corn on the leased land is to be gathered, and have an opportunity to "sell, store or otherwise handle the same," has an interest in such crop as against the tenant.

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2. **Intervention: ACTION FOR INJURY TO CROPS: RIGHTS OF LESSOR.** In an action by the tenant to recover damages to such crop the landlord should be allowed to intervene and recover his proportion of the damage.
3. **Appeal: REVERSAL: DIRECTIONS.** In this case the landlord was not allowed to intervene, and the tenant recovered the entire damage to the crop. The judgment against the intervener is reversed, and the trial court directed to ascertain the landlord's equitable proportion of the judgment so recovered.

APPEAL from the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Reversed with directions.*

Lambert & Armstrong, for appellant.

Kelligar & Ferneau, Livingston & Heinke and R. F. Neal, contra.

SEDGWICK, J.

The question in this case arose out of *Dryden v. Peru Bottom Drainage District*, p. 837, *post*. Mr. Mulhall filed a petition in intervention in that case in the district court for Otoe county, alleging that he was the owner of the land upon which the damage was done, and that he had leased it for that season to the plaintiff, Dryden, and under the terms of his lease was interested in the crop damaged, and asked to recover his damages of the defendant in that action. Upon motion of the defendant, the district court struck his petition in intervention from the files and refused him relief. From that order of the district court, the intervener appealed.

It appears from the record in the original case that the court allowed the plaintiff to recover all damages to the crops growing upon the land during the season for which that action was brought. The question whether the intervener was entitled to recover depends upon the construction of the lease. The lease provided that the tenant should give the landlord a mortgage upon the crops to secure the performance of the conditions of his lease, and it does not appear that any such mortgage had been given or that the lease had been filed as a lien upon the crops, but the defendant is not in a position to claim the protec-

tion of an innocent purchaser. The question is as to the rights and respective interests of the landlord and tenant in the crops damaged. The lease provided: "And the said second party, in consideration of the leasing of the premises, as above set forth, covenants and agrees with the first party to pay as rent for the same in the manner following, that is to say: 2,000 bushels of corn to be delivered at the elevator at Peru, Nebraska, on or before December 25, 1912." It is contended that this provision does not give the landlord any interest in the crop itself because the tenant might pay the rent in corn produced from any other place as well as from the land leased. The lease, however, contained another provision to the effect that the tenant should notify the landlord before husking the corn, and "that he will not in any event permit said work to be done before the first party is on the premises and prepared to sell, store, or otherwise handle the same." It also provided that not later than June 1 the tenant should secure the "performance of the terms and conditions of this contract and lease, and the payment of the rents reserved hereunder on his part, by calling at the first party's office, at Sioux City, at the office of John Mulhall, at Sioux City, Ia., not later than June 1 of each year, and executing to the first party a chattel mortgage on the crop grown or gathered on said premises." It also contained the provision that the landlord should have a lien upon the crops upon the premises for the payment of the rents. These provisions gave the landlord an interest in the crop as against the tenant, and the court should have apportioned the damages between the landlord and tenant in proportion to their respective interests.

The judgment of the district court is reversed and the cause remanded, with instructions to take further evidence, if necessary, and determine the equitable interest of the landlord in the judgment rendered against the defendant.

REVERSED.

LETTON, J., not sitting.

CHRIS WILKEN ET AL., APPELLANTS, V. CAPITAL FIRE INSURANCE COMPANY, APPELLEE.

FILED MAY 13, 1916. No. 18631.

1. **Principal and Agent: ACTS OF SUBAGENT: WHEN BINDING ON PRINCIPAL.** An agent appointed for a specific duty is not authorized to appoint subagents for the transaction of the business of his principal, but may delegate to a subagent the execution of merely mechanical, clerical, or ministerial acts involving no judgment or discretion, and such acts of the subagent so authorized are regarded as the acts of the agent who authorizes them, and are binding upon the principal.
2. **Insurance: ACTS OF SUBAGENT: LIABILITY OF INSURER.** A duly authorized agent of an insurance company sent an application for insurance in a specified amount upon specified property to a bank to be executed by the owners of the property. The owners of the property signed the application and left it with the bank to be returned to the agent. The bank through some oversight failed to return the application to the agent for more than ten days. In the meantime the property was destroyed by fire, and the insurance company refused to pay the loss solely because the application had not been received and approved and a policy issued before the fire occurred. *Held*, that the delay of the bank in forwarding the application must be considered as the act of the agent, for which the company is responsible, and that the question of the liability of the company for failure to duly act upon the application was for the jury.

APPEAL from the district court for Gage county: LEANDER M. PEMBERTON, JUDGE. *Reversed*.

Hazlett & Jack and Walter Vasey, for appellants.

G. E. Hager, *contra*.

SEDGWICK, J.

The plaintiffs bought of Nichols & Shepard Company, at its office in Lincoln, a threshing machine outfit. The machine was shipped to them at Adams, Nebraska, and received there about the 23d of June, 1913. The agreement was that the machine should be paid for by a note

signed by the plaintiffs. A note for their signature, with other papers, was sent to the Farmers State Bank of Adams by Miss Sherman, a bookkeeper in the office of Nichols & Shepard Company, at Lincoln. With these papers she sent them an application for insurance upon the property in the defendant company. The plaintiffs signed the application for insurance, and also executed a note for the premium, and left the papers at the bank to be forwarded. Afterwards the property was destroyed by fire, and the company refused to pay the loss, on the ground that the application had not been approved and no policy had been issued. The plaintiffs brought this action in the district court for Gage county, alleging that they were damaged by the negligence of the defendant company in not acting upon the application and issuing the policy. The trial court instructed the jury to find a verdict for the defendant, and the plaintiffs have appealed.

It appears that Miss Sherman, the bookkeeper of the Nichols & Shepard Company, was the authorized agent of the defendant insurance company to take applications for insurance upon threshing machines sold by the Nichols & Shepard Company, and to forward those applications to the defendant insurance company. The papers with the application for insurance were received at the bank about the 23d day of June, 1913, and very soon thereafter all of the plaintiffs, who were all of the purchasers of the threshing machine interested in the insurance, except two, signed the application. The evidence fairly shows that these two also signed the application as early as the 15th of July. The fire occurred on the 26th of July, and the bank, being notified of the destruction of the property by fire, immediately forwarded the application to Miss Sherman, the company's agent. She filled the blanks in the application correctly describing the property, and also filled other blanks, and forwarded the application to the defendant company. The company returned the application, denying any liability because the application had not been approved and no policy had been issued. It is not

contended that there was any defect in the application, or that the blanks had not been filled and the application completed by Miss Sherman, as contemplated by the parties. It is insisted on behalf of the defendant company that the bank was not its agent, and that no liability existed on the part of the company because of the negligence of the bank. It is undoubtedly true that the company's agent was not authorized to appoint a subagent for the company for the transaction of the company's business, but as is said in 31 Cyc. 1428: "Having exercised his discretion and determined upon the propriety of an act, an agent may delegate to a subagent the execution of merely mechanical, clerical, or ministerial acts involving no judgment or discretion; and the acts of such a subagent, to whom such power and authority have been delegated by the agent, are regarded as the acts of the agent himself, and are therefore as such binding on the principal." It is clear that the delay of the bank in returning the application after it had been duly executed must be considered as though the delay had been by Miss Sherman herself after she had received the application from the bank. The evidence shows that the plaintiffs were responsible men. Their note was good, and the risk was a desirable one for the company. The defendant company declined liability solely upon the ground that the application had not been approved and the policy issued, and there was no attempt to show that the risk was an undesirable one or would not have been accepted if the application had been duly received.

A similar case was recently decided by the supreme court of Iowa. That court in quite an exhaustive opinion held the insurance company liable under very similar conditions. In that case the agent of the insurance company told the applicant for insurance that the notes given for the insurance would be returned if the application was rejected. The applicant then called upon the company's physician and was examined, and was informed that he had passed a satisfactory examination. The company's agent had been in the habit of calling on the physician for the

application with the examination, and the physician accordingly left these papers on his desk for the agent; but the agent neglected to call for the papers until the physician learned that the applicant had been drowned, whereupon the physician mailed the application to the company. The court said: "The association was bound by the acts of its agents and chargeable with any consequences that resulted from the failure of Rogers (the agent) to promptly forward the application and physician's report. In other words, if the association was under a duty to promptly act on the application and notify Duffy (the applicant), as we think it was, it cannot shield itself from the responsibility by the fact that the application and medical report had not been received by it and therefore it could not act. See *Northwestern Mutual Life Ins. Co. v. Neafus*, 145 Ky. 563. The possession of these by its agent had the same effect as if they were in the possession of the association at its home office. Assuming, then, that the application and medical report had been promptly forwarded by the agent, and that the application was not accepted or rejected within the time intervening prior to his death, it seems manifest that whether this was an unreasonable delay was for the jury to determine, and we so hold." The court then considered the question whether it was negligence on the part of the applicant in not seeing that the application was duly returned, and said: "The applicant had done all he could or was required to do in the matter. He had the right to assume that the application would be forwarded immediately after the medical examination and was so assured. * * * Moreover, about all he could have done was to withdraw his application and apply to another insurer for a policy, and this, one who has applied to a company of his choice would quite naturally hesitate to do. Under the circumstances, it cannot be said, as a matter of law, that the deceased was at fault in not stirring defendant to action by inquiry as to the cause of delay or in not withdrawing his application. At the most, this also was an issue appropriate for the determination of the jury.

* * * We think the jury might have found that, in all reasonable probability, had the association passed upon the application, it would have been accepted. * * * The association was actively soliciting members, and it seems to us that the record leaves little, if any, doubt but that, had the association ever passed on the risk, it would have been accepted and the certificate issued." *Duffie v. Bankers Life Ass'n*, 160 Ia. 19. The court then quoted from *Continental Ins. Co. v. Haynes*, 10 Ky. Law Rep. 276, as follows: "It is to be assumed that the company will accept the risk if advantageous to it, which it must be, if fairly and honestly contracted for, because that is the business in which it is engaged, and that is the object for which its agent acted; and, therefore, to allow it, under the reservation of the right to approve, to reject simply because a loss has occurred, would destroy the mutuality of the contract and inflict upon the party the misfortune he had provided against." In *St. Paul Fire & Marine Ins. Co. v. Kelley*, 2 Neb. (Unof.) 720, the action was upon an alleged contract of insurance. The agent had accepted payment of premium at less than the regular rate and the application was returned for that reason. The loss occurred before the required premium was received by the company. It does not appear whether the applicant had made the additional payment of premium. There was no question of negligence or wilful delay of the company in acting upon the application. The case is not in point.

The trial court, as a reason for the decision, stated upon the record that "Mr. Abbott (officer of the bank) had all his dealings with Nichols & Shepard Company until after the fire; he didn't know anything about this woman (the agent) at all until after the fire, and, as far as I can see, this woman did not have anything to do with this thing until after the fire." This refers to the fact that the letter in which the application was sent to the bank by Miss Sherman included also the papers between plaintiffs and the Nichols & Shepard Company and purported to be written by the latter named company. This reason does not appear

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to us to be controlling. It is not denied that Miss Sherman was the authorized agent of the defendant company. Indeed, it was so alleged in the defendant's answer. As such agent she inclosed the application in behalf of the defendant company. She entrusted to the bank a mere mechanical duty that any one could have performed for her, and the conduct of the bank in performing that duty must be considered as the act of Miss Sherman as the company's agent. The issues should have been submitted to the jury with proper instructions.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

LETTON, ROSE and FAWCETT, JJ., dissent.

SUPERIOR NATIONAL BANK, APPELLANT, v. NATIONAL BANK
OF COMMERCE, APPELLEE.

FILED MAY 13, 1916. No. 18635.

1. **Banks and Banking: CHECKS: ASSIGNMENT OF FUNDS.** Section 188 of the negotiable instruments act (Laws 1905, ch. 83, Rev. St. 1913, sec. 5506) changes the law of this state as it was formerly construed. By that section a check upon a bank does not of itself operate as an assignment of the funds of the drawer. It is the acceptance or certification of the check by the bank on which it is drawn that operates as a transfer of the funds.
2. ———: ———: **ACCEPTANCE.** By section 188 of the act the bank upon which a check is drawn is not liable to the holder of the check "unless and until it accepts or certifies the check," and such acceptance or certification must be in writing.
3. ———: ———: **LIABILITY OF DRAWEE.** The bank upon which a check is drawn will not become liable in equity to the holder thereof by stating orally to such holder that the check is good and will be paid on presentation, in the absence of fraud or deception on its part.

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APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

Field, Ricketts & Ricketts, for appellant.

Hainer & Craft, contra.

SEDGWICK, J.

On the 8th day of January, 1914, the First National Bank of Superior, in the regular course of business, executed and delivered to the Superior National Bank its check on the National Bank of Commerce of Lincoln, in the following form:

"First National Bank.

No. 5588.

76-137

Superior, Neb., Jan. 8, 1914.

Pay to the order of Sup. Nat. Bank \$10,856.07 ten thousand eight hundred fifty-six and 07/100 dollars, payable if desired in Chicago or New York exchange at par.

To National Bank of Commerce, Lincoln, Neb. 43-3.

"Ila L. Adams, A. Cashier."

On that same evening the First National Bank of Superior closed its doors. On the next day the National Bank of Commerce of Lincoln refused payment of the check on presentation, and this action was brought by the Superior National Bank to recover the amount of the check and interest. After the parties introduced their evidence, the court instructed the jury to find a verdict for the defendant, and the plaintiff has appealed.

The briefs of the respective parties are comprehensive and interesting; but, so far as we can see, the result of this case depends upon the construction of certain sections of our negotiable instruments law. Laws 1905, ch. 83. In an attempt to make the law of negotiable instruments uniform throughout the United States, nearly all of the states have now enacted this statute. In furtherance of this attempt at uniformity, the courts, so far, have aimed at a uniform construction of its provisions. We think that certain sections of this act and the construction that has been put upon them by the courts of other states simplify

this case and make it unnecessary to discuss all of the various questions so interestingly presented.

As we have already said, when this check was presented to this defendant bank, the bank refused to accept or certify the same, and insists now that section 188 of the act controls, and that under this section the defendant is not liable upon this check. That section is as follows: "A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check." It appears that soon after the check was received by the plaintiff bank an officer of the bank called the defendant bank by telephone and inquired whether the check was good. There is so much conflict in the evidence as to the exact language used by either party in this telephone communication that the plaintiff rightly insists that, if the liability of the defendant depends upon the construction to be given to this conflicting evidence, that question should have been submitted to the jury.

The question remains whether the liability of the defendant bank could be fixed by notification or conversation over the telephone. The plaintiff contends that there is an inherent difference between the acceptance and the certification of a check by the bank upon which it is drawn, and that, while the acceptance must be in writing, the certification may be oral. The plaintiff also insists that, even if the certification must be in writing, and although the statute expressly provides that the "check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank," still the delivery of this check to the plaintiff bank for full consideration and the oral statement by defendant that "the check is good," made to plaintiff while the plaintiff still had the option to return the check and to refuse to receive it from the drawer in settlement of their accounts, would operate as an equitable assignment of the funds then in the bank to the credit of the drawer of the check. In some respects there may be a

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difference between an acceptance and the certification of a check, but is there any difference that affects the question presented in this case? Section 188 changes the law in this state as it was formerly construed, and that section has been considered and construed in *Hentz v. National City Bank*, 159 App. Div. (N. Y.) 743; *Rambo v. First State Bank*, 88 Kan. 257; *Baltimore & O. R. Co. v. First Nat. Bank*, 102 Va. 753; *Van Buskirk v. State Bank*, 35 Colo. 142; *Tibby Bros. Glass Co. v. Farmers & Mechanics Bank*, 220 Pa. St. 1. "Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance." Laws 1905, ch. 83, sec. 186. "Where the holder of a check procures it to be accepted or certified, the drawer and all indorsers are discharged from liability thereon." Section 187. The certification of the check at common law was by indorsement thereon in writing, and by the express provision of the statute itself is "equivalent to an acceptance." In the provision that the bank shall not be liable to the holder "unless and until it accepts or certifies the check," the common law method of certifying a check is clearly intended. The evidence on the part of the plaintiff is that in the conversation over the telephone the officer of the defendant bank said that "the draft was good and they knew their business, if I would send the item to him they would give us Chicago or New York exchange," while that officer himself testified: "I told him it was good now; * * * there was no reference to the payment of the draft at all." This discrepancy illustrates the necessity of a definite provision so that the liability upon negotiable paper can be fixed beyond the uncertainty of misunderstanding communications by telephone, or indeed any oral communications. The plain intention of the statute is that the bank upon which the check is drawn shall not be liable upon the check unless the evidence of the acceptance or certification of the check is reduced to writing.

If this communication by telephone could be construed with the other evidence as operating as an equitable assignment of the funds in the bank, the purpose of the stat-

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ute would be thwarted. There is, of course, no doubt that as between the maker of the check and the drawee an oral agreement transferring the funds of the maker of the check in the bank would be binding upon the parties to that agreement. In the Kansas case above cited it was expressly held: "A bank is not liable on equitable grounds to the holder for the amount of an unaccepted check which it has refused to pay because the holder acquired the check on the oral representation of the bank that the drawer had funds on deposit to meet the check, that the check was good, and that the holder might safely take it in payment for goods sold the drawer."

As we understand the statute, the judgment of the district court is right, and is

AFFIRMED.

FAWCETT, J., not sitting.

CHARLES F. DRYDEN, APPELLEE, V. PERU BOTTOM DRAINAGE
DISTRICT, APPELLANT.

FILED MAY 13, 1916. No. 18657.

1. **Trespass: RIGHT OF ACTION.** One in possession of real estate may maintain an action for trespass thereon. Casting water upon the lands of another is a trespass upon real estate.
2. **Venue: ACTION FOR TRESPASS ON REALTY.** Actions for damage for trespass upon real estate must be brought "in the county where such real estate or some part thereof is situated." Rev. St. 1913, sec. 7612.
3. **Waters: SURFACE WATERS: DIVERSION: LIABILITY.** A drainage district that is guilty of negligence in the construction of its ditch, and by reason of such negligence casts the surface water which it has collected upon the lands of another, is liable for damage which is caused by such negligence.
4. ———: ———: ———: ———. It is the duty of a drainage district to so construct its ditch that it will carry off the ordinary

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surface water which is collected in such ditch, and if it negligently fails to do so, and allows the water so collected by it to be cast upon the lands of another, it will be liable for damages caused by such negligence.

5. ———: ———: ———: ———. In such case the fact that the drainage district employed a competent engineer, and constructed its ditch in accordance with the plans of such engineer, will not constitute a defense in an action for damages caused by the improper construction of the ditch.

APPEAL from the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

Paul Jessen, Kelligar & Ferneau and R. F. Neal, for appellant.

Livingston & Heinke, contra.

SEDGWICK, J.

The plaintiff leased a farm in Otoe county from one Mulhall for the year 1912, and took possession and farmed the land for that season. He brought this action in the district court for Otoe county against the defendant drainage district to recover damages caused by the defendant's negligence, as he alleged, in the construction of their drainage ditch, whereby the water was negligently allowed to overflow the land and damage the plaintiff's corn and his interest in the land for that season under the lease. He recovered a judgment, and the defendant has appealed.

The defendant insists that the district court for Otoe county had no jurisdiction of the action because the defendant corporation was situated in Nemaha county with its office and principal place of business in Nemaha county, and no service was had upon the defendant, or could be had, in Otoe county, where the action was brought. Section 7612, Rev. St. 1913, provides: "All actions to recover damages for any trespass upon or any injury to real estate shall be brought only in the county where such real estate or some part thereof is situated." Casting water upon the lands of another is trespass. 1 R. C. L. p. 374, sec. 7. The gist of an action for trespass to real property is injury to

plaintiff's possession. One in possession of real estate may maintain an action for trespass thereon: 4 Sutherland, Damages (3d ed.) sec. 1009. This, then, was an action to recover damages for trespass upon real estate, and could only be brought in the county where the land is situated.

Upon the second proposition the defendant urges two reasons for reversal. It is first contended that the plaintiff failed to establish a case because he did not allege and prove "that there was still unexpended benefits out of which the alleged damage of the plaintiff could be paid." A drainage district under this statute is organized by and for the benefit of the parties owning the lands to be drained. It is presumed to benefit their lands sufficiently to pay for all investments necessary, including all expenses and liabilities. If it fails to do so and proves to be a losing undertaking, the loss falls upon the owners of the lands supposed to be benefited thereby. But this consideration will not justify them in negligently injuring their neighbors and others in the construction of their ditches. If they are not benefited to the full amount of their investment, and their own negligence causes damage, there seems to be no reason for requiring those who were damaged to suffer the loss, rather than all of those who are responsible for the negligence which caused the loss.

The second reason urged is that the court instructed the jury that it was the duty of the defendant drainage district "to employ a competent and skilled engineer to lay out and plan its system of drainage and reclamation, and to see that such engineer's skilled knowledge was used in the construction of the new channel for the waters of Camp creek, and to construct such channel or ditch of sufficient size and capacity to carry and accommodate the ordinary flood waters of Camp creek and its tributaries. And if you find from a preponderance of all of the evidence that the ditch so constructed was insufficient to accommodate the ordinary flood waters of Camp creek, then the failure of the defendant to construct said ditch of sufficient size for that purpose would constitute negligence." The court refused

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the request of the defendant to instruct the jury that, "if you find from the evidence in this case that the defendant employed competent and skilled civil engineers to design and plan the channel to carry the waters of Camp creek, and that same was constructed according to such plans, then the defendant is not guilty of negligence in the construction of such new channel, and would not be liable in this action for negligent construction." It is said: "An engineer who exercises the care, skill, and ability usually exercised by the members of his profession is not liable in damages for an honest error in judgment." *County of Mille Lacs v. Kennedy*, 129 Minn. 210. That case seems to be relied upon by defendant, but it is not in point. The defendant constructed this ditch for the benefit of its incorporators and stockholders, and, in constructing it, it is bound to use reasonable and ordinary care to avoid injuring the property of others. According to the allegations of the petition it conducted the ordinary surface water into the vicinity of the defendant's land, and negligently failed to provide a sufficient ditch and embankments to carry away the waters so conducted, but allowed them to escape upon the plaintiff's land to his damage. By this means it collected the surface waters and cast them upon the lands of the plaintiff. No individual or corporation, public or private, could be guilty of such negligence without liability for the damage occasioned thereby.

The judgment of the district court is

AFFIRMED.

LUCIA DILLENBACH, APPELLEE, v. THOMAS KERR ET AL,
APPELLANTS.

FILED MAY 13, 1916. No. 18872.

1. **Appeal:** QUESTIONS CONSIDERED. This court upon appeal will ordinarily consider only the questions presented in the briefs.

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2. **Deeds: INTEREST CONVEYED.** One who joins with the owner of the fee in the execution of a deed cannot afterwards establish a lien on the land on the ground that the grantee in the deed did not pay the full value of the land and paid nothing except to the owner of the fee.
3. ———: ———. The grantee in a deed cannot, as against one in possession when the deed was executed, urge any greater right under his deed than the grantor had.

APPEAL from the district court for Adams county:
ERNEST B. PERRY, JUDGE. *Affirmed as modified.*

John Snider and Charles E. Bruckman, for appellants:

J. W. James, contra.

SEDGWICK, J.

The plaintiff began this action in the district court for Adams county to establish and quiet title in certain real estate in that county and to redeem from alleged liens. The defendant Thomas Kerr, by his guardian William M. Lowman, alleged title in himself, and denied that plaintiff has any right or interest in the real estate, and asked to have his title quieted.

It is conceded that Daniel Dillenbach, the owner of a certain tract of land in Adams county, conveyed it, his wife joining in the deed, to his son Daniel S. Dillenbach, subject to two mortgages. In the deed the grantee agreed to board and clothe the grantors during their respective lives, and agreed that they should have the use and control of the dwelling-house and other improvements on the land. Afterwards the land was sold upon foreclosure of the two mortgages, and was purchased by the mortgagees William Kerr and one Clark, the owner of one of the foreclosed mortgages. The sale upon foreclosure was not confirmed, and Daniel S. Dillenbach, the holder of the legal title, conveyed the land to the said William Kerr. The plaintiff claims the land under a subsequent deed from Daniel S. Dillenbach. William Kerr conveyed it to his son, the defendant Thomas Kerr. The trial court found "against the

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plaintiff in favor of the defendant, so far as the plaintiff seeks to declare, or to be declared the owner and to be decreed as entitled to reclaim" the land. "That plaintiff is entitled to an accounting as to the value of the interest acquired by William Kerr, on September 17, 1898, and not then incumbered; * * * that as a condition precedent to defendant having his title quieted as against plaintiff, he should pay the value of said interest, which is found by the court to be \$2,950." From this finding and decree thereon in plaintiff's favor, the defendant has appealed.

The plaintiff makes no contention in the brief that the decree is wrong as against her, and it is not necessary to inquire whether plaintiff has regularly appealed therefrom. The plaintiff contends that the finding and decree requiring defendant to pay plaintiff \$2,950 as a condition to have his title quieted is supported by the pleadings and evidence. The contention seems to be that William Kerr by his deed took only the interest of Daniel S. Dillenbach, and that the interest of Daniel Dillenbach and his wife which was reserved in their deed to Daniel S. Dillenbach was never acquired by William Kerr, and was therefore not conveyed in his deed to the defendant Thomas Kerr. The plaintiff has asked leave to amend the petition in this court so as to allege that Daniel Dillenbach and his wife joined in the deed from Daniel S. Dillenbach to William Kerr, and concedes that the evidence shows that to be a fact. It is, however, argued that the land was then, more than 15 years ago, worth more than the amount William Kerr paid therefor, and that no consideration therefor was paid for the right and interest of Daniel Dillenbach and his wife. It is admitted that William Kerr took possession of the land upon receiving his deed, and that Daniel S. Dillenbach and his wife paid him rent therefor for several years, and "at the expiration of such time, they removed from the land, upon the demand of the Kerrs." As the pleadings did not allege that Daniel Dillenbach and wife joined in the deed to William Kerr, the trial court apparently did not consider that fact. There was not a failure of consid-

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eration for the deed. William Kerr paid a consideration for his deed, and all grantors signed the deed without reservation. It would make no difference to which one of the grantors the consideration was paid, it would be a consideration for the deed as executed, so far as the grantee was concerned. The deed conveyed the whole interest of the grantors. The question whether the grantee took the deed as security only was determined against the plaintiff by the trial court and is not now presented.

The judgment of the district court is modified so as to quiet the title of defendant absolutely, and, as modified, is affirmed. Each party will pay his own costs in this court.

AFFIRMED AS MODIFIED.

LETTON, J., concurs in the conclusion.

ROSE and HAMER, JJ., not sitting.

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ANNA M. BUNTING, APPELLEE, v. OAK CREEK DRAINAGE DISTRICT, APPELLANT.

FILED MAY 13, 1916. No. 18874.

1. **Corporations: LIABILITY FOR NEGLIGENCE.** Local corporations created by request or consent of the persons residing in the territory incorporated and principally for their benefit, although they are clothed with powers of a public nature, are liable for damages caused by their negligence.
2. **Drainage Districts: LIABILITY FOR NEGLIGENCE.** A drainage district organized and acting under article V, ch. 19, Rev. St. 1913, is liable for damages caused by its negligence in the construction of its works.
3. **Eminent Domain.** Condemnation by right of eminent domain is not allowed except so far as it is necessary for the proper construction and use of the improvement for which it is taken.

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4. ———: DAMAGES. If the application for condemnation specifies the desired taking and use of certain real estate and shows that it is necessary for the improvement contemplated, all damages caused by such taking properly exercised will be included in the damages allowed in such proceedings, which will be a bar to any further claims for such damage.
5. ———: DAMAGES FROM NEGLIGENT CONSTRUCTION. In such case damages caused by the negligent construction of the improvement are not contemplated in the condemnation proceedings and are not barred thereby.
6. ———: ———: ACCRUAL OF RIGHT OF ACTION. Damages caused unnecessarily by negligence and improper construction of the improvement cannot be anticipated, and a right of action accrues therefor when the damage occurs.
7. Appeal: PLEADING: IRRELEVANT MATTER. If a petition states one cause of action for damages to real estate, and also contains allegations as to other damages to the same real estate of a similar nature which are not sufficient of themselves to justify a recovery thereon, overruling a motion to require the plaintiff to separately state and number his causes of action will not be sufficient ground of reversal, when no motion is made to strike out such allegations, and evidence of both injuries to the real estate is received without objection on that ground. A plaintiff cannot be compelled to state a cause of action which he has failed to plead.
8. ———: INSTRUCTION AS TO MEASURE OF DAMAGES: HARMLESS ERROR. An instruction upon the measure of damages which follows and properly reflects the evidence admitted without objection will not be held so prejudicially erroneous as to require a reversal.
9. ———: MISCONDUCT OF JURY: FAILURE TO OBJECT. Alleged misconduct of the jury must be called to the attention of the trial court at the earliest opportunity. A party who sees the matters supposed to be misconduct and makes no complaint until after the verdict is not entitled to a reversal because of such supposed misconduct. He cannot so speculate upon his chance of a favorable verdict.

APPEAL from the district court for Lancaster county:
P. JAMES COSGRAVE, JUDGE. *Affirmed.*

T. F. A. Williams, for appellant.

B. F. Good, *A. M. Bunting* and *A. W. Richardson*, contra.

W. J. Courtright, *amicus curiæ*.

SEDGWICK, J.

The defendant drainage district constructed a channel across a part of the lands of the plaintiff to carry the water of Oak creek in a more direct line. The plaintiff began this action in the district court for Lancaster county to recover damages to her land caused, as she alleged, by the negligence of the defendant in the construction of the channel and in the construction of a bridge over the channel. The trial in the district court resulted in a verdict and judgment in favor of the plaintiff, and the defendant has appealed.

The first important, and perhaps controlling, contention of the defendant is that a drainage district is a public corporation, and is not liable to an action for negligence. Chapter 19, Rev. St. 1913, is devoted to drains and drainage. It contains seven different articles: "I. Drainage by county authorities. II. Drainage by incorporated companies. III. Drainage for agriculture or sanitary purposes by individual landowners. IV. Drainage districts organized by proceedings in district court. V. Drainage districts organized by vote of landowners. VI. Natural lakes. VII. Sanitary drainage districts in cities." The pleadings in this case do not plainly show under which of these several articles this district is organized. The case apparently was tried by all parties on the theory that it was immaterial under which one of the several classes of drainage districts the defendant belonged. At the close of the trial the jury were excused, and the defendant offered evidence tending to show that the defendant district was organized under the act of 1907, Laws 1907, ch. 153, as amended. This evidence was objected to by the plaintiff on the ground that it was immaterial, "waiving, however, the production of the county clerk to prove the original incorporation," but as the evidence is, we think, material and no other ground of objection was made, it may be considered that the defendant was organized under that act, which is article V, ch. 19, Rev. St. 1913—"Drainage dis-

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tricts organized by vote of landowners." In 2 Farnham, Waters and Water Rights, sec. 256, it is said: "The same principle which applies to a county applies to a drainage district. Unless the statute gives a right of action against it, no suit can be brought against it." And this statement and similar statements of other authors are relied upon by the defendant as establishing the doctrine that under no circumstance can a drainage district be liable for negligence. In the same section of his work the author quoted from plainly shows that the question of liability for negligence depends upon the statute under which it is organized; that is, upon the nature and character of the organization. He says: "So, whenever it is seen that the municipality has committed a wrongful act in turning water or sewage onto abutting property, there is no hesitation in holding that it is liable for the injury. Municipal corporations are by statute generally made liable for their acts of negligence the same as private individuals. When the question arises, however, as to the liability of a county or drainage district, a different principle applies. * * * Therefore, in determining whether or not they are liable for their negligent acts, attention must be given to the provisions of the statute." The author devotes something over 300 pages to the discussion of drainage, and his discussion shows that in the statement quoted he is considering drainage districts formed as counties are, by legislative enactment for governmental purposes. The state is a sovereign and cannot be sued without its consent. Being a sovereign, it is presumed that it will do justice to its citizens without compulsion, and even the sovereign itself under our constitution cannot take or damage private property without compensation. It has frequently been decided in this court that counties in performing the duties that are imposed upon them by the law are not ordinarily liable for the negligence of their officers, unless the statute under which they are acting so provides. It is not necessary in this case to consider under what circumstances a county might be

liable when proceeding under article I, ch. 19, Rev. St. 1913.

One of the earlier cases holding that a county is not liable for damages caused by the negligence of its officers is *Wood v. Colfax County*, 10 Neb. 552, in which it was held: "A county is not liable in damages at common law, or under the Revised Statutes of 1866, for injuries caused by the breaking down of a public bridge, which was caused by the negligence of the county commissioners." In the opinion by Chief Justice Maxwell it was said: "If the negligence complained of in the petition and consequent injury to the plaintiff had been occasioned by a natural person or a municipal corporation proper, the right to recover would be unquestioned. But are counties municipal corporations? Municipal corporations may be defined to be bodies politic and corporate, created by law for the purpose, primarily, of regulating and administering the local and internal affairs of towns, cities and villages. 1 Dillon, *Municipal Corporations* (3d ed.) sec. 9. Such corporations are created principally for the benefit and convenience of the inhabitants composing the corporation, although they are important auxiliaries of the state in the administration of the law. The charters conferring powers, prescribing duties, and imposing burdens must in some way receive the assent of those to be governed by their provisions, and they thus accept the benefits and agree to perform the duties imposed upon them. * * * A county is a mere local subdivision of the state, created by it without the request or consent of the people residing therein."

Drainage districts organized by vote of landowners under article V are voluntary corporations principally for the benefit of the owners of the land lying in the district incorporated. In determining whether such districts shall be organized, any person may cast one vote "for each acre of land or fraction thereof and each platted lot which he may own or have easement in." Rev. St. 1913, sec. 1872. A majority of the votes is necessary for the formation of the district. The defendant cites *Heffner v. Cass and Mor-*

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gan Counties, 193 Ill. 439, as holding that a drainage district is not liable for the negligence of its officers. In a more recent case, *Bradbury v. Vandalia Levee and Drainage District*, 236 Ill. 36, 47, 19 L. R. A. n. s. 991, that court referred to a still earlier case as holding that such districts "were to be regarded as mere public involuntary quasi-corporations, and therefore not liable to respond in damages to an individual injured by the negligent or wrongful act of their officers, agents, or servants." The court then referred to the *Heffner* case as holding the same doctrine, and said: "It is quite evident that it needs some revision or limitation. The ground of distinction between corporations which are liable for the negligent or wrongful act of their agents or servants and those which are not is that public involuntary quasi-corporations are mere political or civil divisions of the state created by general laws to aid in the general administration of the government and are not so liable, while those which are liable have privileges conferred upon them at their request, which are a consideration for the duties imposed upon them. *Kinnare v. Chicago*, 171 Ill. 332. Neither the state, nor any part of it, is divided by the legislature into drainage districts, nor do they have public duties thrust upon them without their consent. The organization of a drainage district is for the sole and exclusive benefit of the territory within the district (*Commissioners of Union Drainage District v. Highway Commissioners*, 220 Ill. 176), and the lands within the district are assessed to pay the whole cost on the theory that they alone are benefited. * * * The organization is not different, in principle, from the organization of cities, villages or towns under a general law, on a petition of a certain proportion of the legal voters within the territory. It is correct to say that a drainage district is a quasi-corporation if the act under which it is organized does not make it a corporation in fact; but it is not created for political purposes or for the administration of civil government."

The district chooses its own board of directors and its work is done under its direction and supervision. It is given certain additional powers and privileges because the formation of the district "will be for the public health, convenience and welfare." It is given the power of eminent domain as are railroads and ordinary municipal corporations. In the conduct of their affairs they must not negligently injure others. If they do, they are liable for such injuries as cities and villages are.

A brief has been filed by a "friend of the court" in which it is vigorously insisted that such damages as are here alleged could be recovered only in the original condemnation proceedings in which the drainage district obtained the right of way. The brief says: "This was not a question of negligence in construction, but a question of deliberate plan. The district therefore actually took for drainage purposes the right of way involved in the ditch and actually took the lake for the purpose of constituting a channel of the new creek and for the purpose of furnishing a spillway temporarily until the outlet drained the water away. This was a part of the plans." The position would be more intelligible if it was not also contended that a drainage district is not liable for negligence. We do not see why the same rule that is applied to other corporations which exercise the right of eminent domain is not applicable here. Condemnation is not allowed, except so far as it is necessary for the proper construction and use of the work. If the drainage district had attempted to condemn this lake as a "spillway," and had definitely disclosed that purpose, and the proposed manner of constructing and using the same, and, upon objection by the parties affected, had made it appear to be a necessary and proper construction of the improvement, the district would be charged in the condemnation proceedings with all damages caused by the proper construction of the work. Negligence would not be presumed and anticipated. Persons injured by a necessary and proper construction of the work must be paid their

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damages before the work is done. Damages caused unnecessarily by negligence and improper construction of the improvement cannot be anticipated, and a right of action accrues therefor when the damage occurs.

It is alleged that the defendant "constructed a dam in the regular channel, and a ditch or artificial channel across said bend, designed to divert the flow of water from its natural channel in Oak creek into the artificial channel, as aforesaid. * * * That in the construction of said artificial channel the defendant was guilty of negligence in this, to wit, in excavating a channel only ten (10) feet in width at the bottom instead of twenty (20) feet in width, and which channel was insufficient in width and depth to retain and imprison in its banks the flood waters that ordinarily occur and which theretofore flowed in the natural channel of Oak creek. * * * The defendant drainage district was also guilty of negligence in constructing a pile bridge across the said artificial channel of Oak creek where it crosses the public road about 300 feet southeast of the lake bed, through which said channel runs. That, instead of constructing a single-span bridge with stone abutments on each side of said channel, the said district constructed a three-span bridge, with piles driven thereunder for support of said spans in such manner and so closely together that the said piling so obstructed the channel that trees and other debris which flowed in said channel during the flood of May, 1913, formed a barrier across the channel, thereby raising the height of water in the channel, backing it up to the opening in the dike at the lake bed, causing it to spread out upon plaintiff's land, and thereby augmenting and increasing the flooding thereof in the month of May, 1913, as aforesaid."

There is no attempt on the part of defendant to justify these acts as necessary in the proper construction of the work. The petition contains unnecessary, and perhaps improper, allegations; but, considering the manner of trying the case by both parties, the defendant is not in a position

to insist that damages alleged in the petition must be regarded as compensated in the condemnation proceeding.

The defendant filed a motion to require the plaintiff to separately state and number her causes of action, and to strike out certain allegations of the petition. The court sustained the motion to strike out parts of the petition, but overruled the motion to require plaintiff to separately state and number her causes of action. The defendant complains of this refusal of the court. The petition alleges somewhat in detail damages alleged to have been caused in the months of March and April, 1912, and then alleges "that, in consequence of the negligence of the defendant, as aforesaid, the plaintiff's land to the extent of twenty-five (25) acres was subjected to a second overflow in the month of May, 1912, and a third overflow in May, 1913, and a fourth flood in March, 1914, and there was deposited thereon a large additional amount of debris, together with a large quantity of water, which remained thereon for several days in consequence of defendant's negligence in permitting such flood waters to escape from such artificial channel." This latter allegation hardly amounts to an allegation of a separate cause of action. It alleges no damages. It would no doubt have been stricken out as irrelevant if motion had been made for that relief. This is also true of other similar allegations.

"Where by the negligent construction of a railway embankment and ditches, surface water is discharged upon the land of an adjoining proprietor and his crops thereby injured, such party's cause of action accrues at the date of the injury, and not at the date of the construction of the embankment and ditches. * * * The measure of damages for the destruction of a growing crop is the value thereof in the condition in which it exists at the time of its destruction." *Morse v. Chicago, B. & Q. R. Co.*, 81 Neb. 745. These principles apply equally to injuries to the land itself.

The court limited plaintiff's recovery to damages caused to the land by the several floodings thereof in different

years, and stated that the measure of plaintiff's damages was "the fair market value of plaintiff's land before it was flooded in March, 1912, and the fair market value after it was flooded in March, 1914."

When the evidence was offered by plaintiff, the witness was asked: "Now, give the fair and reasonable market value of this land before it was flooded in 1912, and after the last flood of March, 1914." The defendant objected "because it does not exclude from the witness' consideration all of the elements that entered into the award made by the jury of condemnation." No objection was made upon the ground now insisted upon. The witness answered the question, showing a difference in value of \$9 or \$10 an acre, and added: "There is a depreciation, I would say, from \$7 to \$8 (an acre) in the value of the land." If this depreciation was not caused by the negligence complained of, the defendant might show other cause, if any. After this evidence was admitted without objection, both parties considering at the time that this was the proper method of proving the injury to the land, and defendant objecting only upon the ground that the witness was not duly considering the award upon condemnation, the defendant ought not now to have a reversal because the question of damages was submitted to the jury as it was proved. There was no other basis in the evidence upon which the measure of damages could be submitted. The defendant ought not to defeat the case by such methods.

Complaint is made of the conduct of the jury in viewing the premises under the order of the court. The defendant's attorney accompanied the jury, and knew at the time of the matter of which he is now complaining, but made no objection until after the verdict. There is no evidence that the verdict was affected by the irregularity complained of, and for these reasons this objection must be overruled.

The judgment of the district court is

AFFIRMED.

FREDERICK SPIER, APPELLEE, v. HENRY SPIER ET AL.,
APPELLANTS.

FILED MAY 13, 1916. No. 18920.

1. **WILLS: EXECUTION: COMPETENCY OF WITNESS.** It will not be held that a will was improperly executed simply because one of the witnesses to its execution was less than 14 years of age. If otherwise competent, such witness may testify concerning the execution of a will the same as to any other fact.
2. ———: **VALIDITY: TESTAMENTARY CAPACITY.** Where the testatrix, although she is aged, knows the amount and character of her property and who are naturally the objects of her bounty, and has a full understanding of the persons and purposes to whom she makes devises and bequests, she will be regarded as possessing testamentary capacity, and being competent to make a will.
3. ———: ———: **UNDUE INFLUENCE: BURDEN OF PROOF.** The burden is upon the contestants to establish undue influence exercised upon the testatrix, and in so doing it is not enough to show that the circumstances attending the execution of the will are consistent with the hypothesis that it may have been obtained by undue influence; it must be shown that such circumstances are inconsistent with a contrary hypothesis.

APPEAL from the district court for Pawnee county:
JOHN B. RAPER, JUDGE. *Affirmed.*

S. P. Davidson, for appellants.

Frank A. Barton and J. C. Dort, contra.

HAMER, J.

Application was made to the county court of Pawnee county for the probate of the will of Sophie Spier. The proponent, Frederick Spier, represented to the court that Sophie Spier died in Pawnee county on the 25th day of July, 1913, leaving a last will and testament in which Charles A. Schappel was named as the executor thereof. This will was filed on the 9th day of August, 1913, in the county court of said county, and relates to both real and

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personal estate. Sophie Spier, immediately prior to her death, was a resident and inhabitant of Pawnee county, and was possessed of real estate and personal property therein; the real estate being of the estimated value of \$9,000, and the personal property of the value of \$275. The decedent left surviving her Carl Spier, her son, residing in Nebraska City, Henry Spier, William Spier, August Spier, Frederick Spier, and Louis Spier, all residing in Pawnee county, Nebraska, and Fredericka Frey of Mount Clare, Nebraska, her only daughter. It is alleged that the will was executed on the 19th day of July, 1910, and that at the time of its execution the said Sophie Spier was of lawful age, of sound mind and memory and not under any restraint, and was competent to devise and bequeath said real estate and personal property; that a decree was duly made in the said county court which admitted the said will to probate, and appointed Charles A. Schappel executor of the said will and fixed the executor's bond in the sum of \$1,000; that on the same day said Schappel presented his bond as executor in the sum of \$1,000, with Frederick Spier and Louis Spier as sureties, and said bond was approved by the county judge of said county, and letters testamentary were thereupon immediately issued to the said Schappel as executor of said last will and testament; that on the 30th of September, 1913, the said Henry Spier, August Spier and William Spier filed their appeal bond in said county court in the sum of \$300 appealing from the aforesaid decree probating said will, and on the 9th day of October, 1913, there was filed in the district court for said Pawnee county a transcript of the proceedings in said estate in the county court thereof; that an appeal was prosecuted from the decree of the said county court probating the said will.

Henry Spier, August Spier and William Spier, contestants, filed an answer to the petition on appeal in said case in the district court. They admitted that the said Sophie Spier died at the time and place alleged in the petition, and that at the time of her death she was a resident and

inhabitant of the county of Pawnee, in the state of Nebraska, and admitted that the names and addresses of the heirs at law are properly given in the petition. Each and every other allegation in said petition contained was denied. Said case was heard on appeal in the district court for Pawnee county on the 15th day of April, 1914. There was a jury, which rendered a verdict for the proponent, Frederick Spier. An appeal was taken from the judgment of the district court for Pawnee county to this court.

It is contended: (1) That said alleged will was not executed and witnessed as the law requires. (2) That the deceased was not mentally competent to make a will at the time the alleged will was executed. (3) That the deceased was unduly controlled and influenced by the proponent, Frederick Spier, and his brother, Louis Spier.

The testatrix seems to have been something more than 80 years old when she made the will. It is claimed that she was feeble, and that the will was not executed as the law requires. It is true that Fredericka Spier was only 14 years old at the time she witnessed the will. It is contended that she was incompetent to act as an attesting witness. She was asked and expressed the opinion that she thought her grandmother was competent to do business. It may be considered that she was not very competent to testify about that fact, being of the age of only 14 years, but she had a right to testify to that fact as she could testify to any other fact within her knowledge; and, if she may not have known much about it, it would be for the jury to consider that fact. It is claimed by the contestants that she did not know the meaning of the words "mental capacity" or "capacity to do business." It is probable that not very much knowledge can be gained from reading her evidence. At the same time she was competent to testify. *Evers v. State*, 84 Neb. 708; *Davis v. State*, 31 Neb. 247. We do not care to say that Fredericka Spier was not able to testify. She was not required to have any other

qualifications than those of an ordinary witness. *Carlton v. Carlton*, 40 N. H. 14.

It appears that the testatrix, in the presence of R. R. Mahan and Mike Weber, on the 8th day of February, 1913, declared to Mr. Schappel in the German language that the instrument prepared was her last will and testament, and that it was signed by her, and she desired these gentlemen to sign the attestation clause. Mr. Schappel interpreted her words into English to Mr. Mahan, and Mr. Mahan and Weber signed the instrument in the presence of the testatrix. It appears that Weber could speak German, although he did not remember the conversation.

In *Holyoke v. Sipp*, 77 Neb. 394, it is held, as stated in the syllabus: "A presumption of the due execution of a will arises from the presence of an attestation clause which recites the facts necessary to the validity of the will, and, in the absence of evidence discrediting the statements, the will should be admitted to probate." It is said in the body of the opinion: "When the subscribing witnesses are present at the probate and admit the genuineness of their signatures, but deny or are unable to recollect some or all of the facts which were attendant upon the execution, so that one or both of them are unable or unwilling to testify with positiveness and of their own knowledge that all the requirements of the statute were complied with, a presumption of due and proper execution will arise from the recitals of a perfect attestation clause."

There was a second attestation clause. It recited: "We, the undersigned, have this 8th day of February, A. D. 1913, subscribed our names in the presence and by the request of the testatrix, Sophie Spier. R. R. Mahan, Pawnee City, Nebraska. Mike Weber, Steinauer, Nebraska." It is not necessary that the witnesses see the testator sign, if he acknowledges to them that he has signed the will and shows them his signature thereto. Dame, Probate and Administration (2d ed.) sec. 43.

Publication, as the term is used in the law of wills, is the act or acts of the party by which he manifests that it is his

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intention to give effect to the paper as his last will and testament; and any communication, indicating to the witness that the testator intends to give effect to a paper as his will, by word, sign, or motion, or conduct, is sufficient in law to constitute a publication. *In re Estate of Ayers*, 84 Neb. 16. In the case last-above cited this court held: "Where the evidence shows that the witnesses to a will signed the same at the request of the testator, who thereupon directed the draftsman thereof to place the same in an envelope addressed to the county judge, in whose office it was afterwards found, such acts constitute a sufficient publication of the will."

Concerning the competency of the testatrix, Charles A. Schappel testified that he had been acquainted with the testatrix 20 years or more; that he had had business dealings with her; she being the administratrix of the estate of her deceased son, Herman Spier, who died in the year 1907, and from whom she inherited the 120 acres of land involved in this case. He testified that she frequently came to his office in Pawnee City and talked her business affairs over with him. He went to her house on the 19th of July, 1910, taking with him his partner, Frank Barton, and she directed the making of the will. She gave instructions in the German language, and Mr. Schappel interpreted the instructions to Mr. Barton.

Frank Barton testified that he had been acquainted with her about three years before the making of the will; that she frequently came to the office of Schappel & Barton and talked over her business matters; that he drew the proposed will under her direction and as dictated by her and interpreted to him by Mr. Schappel. He thought she was competent to transact ordinary business affairs on the 19th of July, 1910.

Herman Kruger, the preacher, testified that he had known her 24 years; that he was her pastor, and frequently visited at the house and talked with her about religious and other subjects. In his opinion she was

capable of transacting ordinary business on the 19th of July, 1910.

Dr. Prendergast testified to having had considerable experience with persons mentally deranged. He was called to visit the testatrix and to treat her for acute bronchitis. He had made four calls upon her in March, 1910, and had observed her mental condition. He also treated her in April, 1911, and he finally treated her at the time of her last illness in July, 1913. It was his opinion that her mental condition was normal.

Steinauer, the banker, testified that he had lived within two miles of the testatrix for 40 years. He was well acquainted with her. He had had business transactions with her in loaning and borrowing money. He had often visited her at her house. In his opinion she was competent to transact ordinary business on the 19th of July, 1910.

Numerous other witnesses testified along the same line.

There is no evidence that shows that she was mentally incapable of doing business. Apparently there was nothing to cast serious doubt upon her testamentary capacity.

The third contention is that she was subject to undue influence. It is testified to by John Spier, the old lady's grandson, that she had said that she would like to sell the place and divide it up equally among the boys and her daughter, but she said that Fred had said "no," and not until his boys were big enough. This testimony does not show that Fred had refused his permission. It fails to show that he attempted to control her. It is simply her statement that he had said no, and it is not corroborated by anything that he said in the presence of anybody.

Gottlieb Spier testified that he had heard her say that she would like to have it divided up equally, and each one have so much, but she said she didn't know if she could or not; she said the rest of the boys would all be against it. She did not know that she could do it or not. She would like to divide it up equal. But here again is the same thing; it is only her statement as to what the will of Fred

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and Louis may have been. On that question she may have been timid, or she may have imagined that they entertained this view or that view. If there was evidence that they had directly spoken to her, there would then be something before the court; but there is a total failure of evidence of this kind.

We do not feel we are justified in reaching a conclusion different from that reached in the district court. The judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.



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- fully set forth in the corporate charter and by-laws. *Bauer v. State* 747
14. In a prosecution for embezzlement of money of corporation, whose business amounted to more than \$300,000 a year consisting of thousands of transactions, an expert accountant may testify to result of examination of corporate books. *Bauer v. State* 747
 15. The giving of additional instructions, in presence of accused and counsel without objection, *held* not reversible error. *Bauer v. State* 747
 16. Instruction, in response to request by jury, that in a finding as to value the word "about" does not conform to the statute, and the jury should find some definite amount, *held* not ground for reversal. *Bauer v. State* 747
 17. Evidence that accused left employment and went to other states to avoid arrest may be received, not as a confession, but to be considered with other evidence in arriving at a verdict. *Bauer v. State* 747

Damages. See CONVERSION, 3. EMINENT DOMAIN, 3, 4. INTOXICATING LIQUORS. SALES, 2.

1. Evidence of loss of sexual power resulting from assault *held* admissible, though the petition did not specify such loss as an element of damages. *Morfeld v. Weidner* 49
2. In an action under the federal employers' liability act, where the court has instructed that contributory negligence has been shown, but the jury make no deduction therefor, the court may order a remittitur. *Hadley v. Union P. R. Co.* .. 349
3. A general verdict for plaintiff may be returned in an action under the federal employers' liability act without apportioning damages among the beneficiaries. *Hadley v. Union P. R. Co.* 349
4. A verdict for \$10,000 for personal injury *held* excessive. *Malko v. Chicago, R. I. & P. R. Co.* 158
5. Award of \$25,000 for death *held* excessive. *Hadley v. Union P. R. Co.* 349
6. Award of \$10,500 for personal injuries *held* not excessive. *Wilson v. Omaha & C. B. Street R. Co.* 693

Deeds. See VENDOR AND PURCHASER.

1. Equity will require a return of the purchase money or a restoration of the *status quo*, before setting aside a deed ob-

Deeds—Continued.

- tained by fraud or imposition practiced on a person of weak mentality. *Overton v. Sack* 64
2. Where mental weakness in the grantor exists, and misrepresentation of the grantee or his privies is shown, equity may set aside the deed. *Miller v. Wentz Co.* 286
 3. Where a contract to convey an elevator site for the erection of an elevator provided that, in case the elevator is destroyed, the grantee will rebuild same within a reasonable time, or reconvey, the grantee's title cannot be forfeited for not rebuilding until lapse of a reasonable time after destruction of the elevator. *Nye-Schneider-Fowler Grain Co. v. Hopkins* 244
 4. Where land is conveyed by a deed providing that, if the building thereon is destroyed and the grantee fails to rebuild within a reasonable time, he shall reconvey, the grantee does not lose title by forfeiture during time granted for rebuilding. *Nye-Schneider-Fowler Grain Co. v. Hopkins..* 244
 5. A corporate grantor's right to demand a reconveyance may be waived without the formalities requisite to execution of a deed. *Nye-Schneider-Fowler Grain Co. v. Hopkins.* 244
 6. Where the owner subdivides land into lots and executes deeds to the lots with uniform restrictive covenants, pursuant to a general plan, purchasers may enforce such covenants against each other. *Wright v. Pfrimmer* 447
 7. Purchasers of lots cannot enforce against each other restrictive covenants in a deed to their common grantor, where such covenants were not part of a general plan of improvement, but were imposed for the benefit of other land retained by the original owner. *Wright v. Pfrimmer* 447
 8. In a suit by a prior grantee to enforce a restrictive covenant in a subsequent grantee's deed from the common grantor, the burden is on plaintiff to prove that such covenant was intended for the benefit of his land. *Wright v. Pfrimmer* 447
 9. The intention to deliver a deed must be shown by acts or words, or by both. *Flannery v. Flannery* 557
 10. Delivery of a deed is largely a question of intent, to be determined by the facts and circumstances of the case. *Flannery v. Flannery* 557

Deeds—Concluded.

11. An unmarried man is competent to convey real estate which had been the homestead of himself and wife before her death. *Hill v. Naylor* 791
12. A deed made pursuant to a contract to deposit it in escrow to be delivered after death of grantor, providing that grantor may take possession of deed if grantee fails to perform, becomes a valid conveyance on death of grantor and performance by grantee. *Hill v. Naylor* 791
13. Petition to have two deeds, running to two different grantees, decreed to be mortgages held not demurrable for misjoinder of parties and causes of action. *Gift v. Dress*. 801
14. One who joins with the owner of the fee in executing a deed cannot thereafter establish a lien on the land on the ground that the grantee did not pay full value, and paid nothing except to the owner of the fee. *Dillenbach v. Kerr*. 840
15. The grantee in a deed cannot, as against one in possession, urge any greater right under his deed than the grantor had. *Dillenbach v. Kerr* 840

Divorce. See WITNESSES, 1, 2.

1. Evidence, in a suit to subject land to payment of a decree for alimony, held to sustain decree for plaintiff. *McNamara v. McNamara* 9
2. In Arkansas, divorce and alimony are not subjects of equitable jurisdiction; and the courts have no other powers in such matters than those expressly conferred by statute. *Bodie v. Bates* 253
3. Sec. 2681, Kirby's Dig. Ark., authorizing such alimony as is reasonable, applies where a husband obtains the divorce while sec. 2684 applies where a decree is granted to the wife. *Bodie v. Bates* 253
4. Under sec. 2684, Kirby's Dig. Ark., held that the Arkansas court could not vest the wife in a divorce suit with an interest in Nebraska land of her husband. *Bodie v. Bates* 253
5. The Arkansas court cannot take Nebraska land into account in fixing alimony. *Bodie v. Bates* 253
6. Decree allowing alimony out of Nebraska land held not objectionable as not giving full faith and credit to an Arkansas decree. *Bodie v. Bates* 253
7. In a suit for alimony wherein an Arkansas decree was pleaded as an estoppel, evidence held to show that the

Divorce—Concluded.

- Arkansas court did not take the husband's Nebraska land into account in fixing the amount of alimony. *Bodie v. Bates* 253
8. Decree of Arkansas court *held* to allow the wife as alimony the sum of \$2,611 out of the husband's estate located in Arkansas. *Bodie v. Bates* 253
9. On appeal from a decree of divorce, the supreme court will examine the evidence and draw its own conclusions. *Edholm v. Edholm* 331
10. Award of \$25,000 alimony and \$50 a month for support and education of a minor daughter *held* to be reasonable. *Edholm v. Edholm* 331
11. Where the pleadings and evidence entitled plaintiff to a decree of divorce from bonds of matrimony or from bed and board, *held* that the court could grant divorce from bed and board with suitable maintenance. *Pick v. Pick* 433

Drains. See EMINENT DOMAIN, 1.

1. It is the duty of a drainage district to construct its ditch so that it will carry off normal surface water. *Dryden v. Peru Bottom Drainage District* 837
2. The fact that a drainage district employed a competent engineer and constructed its ditch in accordance with his plans is not a defense in an action for damages caused by improper construction. *Dryden v. Peru Bottom Drainage District* 837
3. Drainage district *held* liable for damage from flooding caused by negligent construction of ditch. *Dryden v. Peru Bottom Drainage District* 837
4. A drainage district organized under art. V, ch. 19, Rev. St. 1913, is liable for damages caused by negligence in construction of its works. *Bunting v. Oak Creek Drainage District* 843

Easements.

A way of necessity over a grantor's land is not generally implied in favor of a grantee who has a convenient outlet across his own adjoining land. *Eng. v. Olsen* 183

Election of Remedies.

1. A futile pursuit of a remedy to which a party is not entitled will not deprive him of a right to which he is entitled. *Commercial Nat. Bank v. Faser* 105

Election of Remedies—Concluded.

2. Pendency of an action to recover the value of attached property *held* not to bar an action on the redelivery bond. *Commercial Nat. Bank v. Faser* 105

Elections. See CONSTITUTIONAL LAW, 9, 10. COUNTIES AND COUNTY OFFICERS, 5. LIBEL.

- While equality of representation in a county board need not be mathematically exact, the apportionment must, as near as practicable, be according to the population. *State v. Moorhead* 527

Electricity.

- Where there was no provision in a franchise ordinance for any charge for the use of meters, *held* that the meters should be furnished to consumers free of charge. *McIninch v. Auburn Mutual Lighting & Power Co.* 582

Embezzlement. See CRIMINAL LAW, 13.

1. Evidence *held* to sustain conviction of embezzlement of corporate funds. *Bauer v. State* 747
2. Instruction that, as to count charging embezzlement of a specific sum, it was not necessary to prove embezzlement of whole amount on any particular day, but the jury could consider the aggregate of separate conversions as the amount embezzled, *held* not erroneous. *Bauer v. State* 747

Eminent Domain.

1. Where property not taken is increased in value by construction of a drainage ditch, such increase is a special benefit and not a general benefit, though the value of other property within the district is also enhanced. *Stocker v. Nemaha Valley Drainage District* 38
2. The right of action for negligence and improper construction of the improvement under condemnation accrues when damage occurs. *Bunting v. Oak Creek Drainage District* 843
3. If the application for condemnation specifies the use of realty necessary for the improvement, the damages allowed will be a bar to further claims for such damages. *Bunting v. Oak Creek Drainage District* 843
4. Damages caused by negligent construction of the improvement are not contemplated in condemnation proceedings, and are not barred thereby. *Bunting v. Oak Creek Drainage District* 843

Eminent Domain—Concluded.

5. Condemnation is not allowed except so far as necessary for proper construction and use of the improvement for which it is taken. *Bunting v. Oak Creek Drainage District* 843

Equity. See DEEDS, 1, 2. PARTIES, 3. TRUSTS.

Estoppel. See DEEDS, 14. DIVORCE, 7. JUDGMENT, 2, 3.

1. The principal in a bond for redelivery of attached property is estopped to assert in an action on the bond that he owns the property. *Commercial Nat. Bank v. Faser* 105
2. A party cannot successfully contend in one suit that the court has no jurisdiction of specified property, and in another litigation with the same party insist that the court had jurisdiction of that property, and thus defeat an adjudication thereof. *Bodie v. Bates.* 253

Evidence. See ATTACHMENT, 2. ATTORNEY AND CLIENT. BILLS AND NOTES. CONSTITUTIONAL LAW, 13. CONTRACTS, 4, 5. CONVERSION, 1, 2. FRAUDULENT CONVEYANCES, 2. JURY, 2. LIBEL, 6, 7. MORTGAGES, 6-8. RELEASE, 1. WILLS, 6. WITNESSES.

1. Physical facts which amount substantially to demonstration may overcome the testimony of several interested witnesses. *Martindale v. Galladay* 200
2. Physical facts will not destroy direct and positive evidence showing want of contributory negligence, unless such facts are so conclusive as to require direction of a verdict for defendant. *Britt v. Omaha Concrete Stone Co.* 300
3. Where witnesses of apparently equal credibility disagree, circumstances tending to indicate which version of the transaction is reliable will be considered. *Shafer v. Beatrice State Bank* 317
4. An itemized receipt held not binding on a party refusing to accept it. *Nelson v. Nelson* 456
5. In an action for services, a witness may testify to value of part of such services. *Anderson v. Akins* 630
6. Spontaneous and unpremeditated declarations as to pain or suffering, made when circumstances show absence of design, are competent evidence of physical condition. *Juckett v. Brennaman* 755

Execution. See EXECUTORS AND ADMINISTRATORS, 1, 2.

Executors and Administrators. See CONTRACTS, 5.

1. Injunction will lie to prevent the collection of a void judgment against an administrator out of his individual property. *Dovey v. Schlater* 735
2. Petition for injunction to prevent collection of judgment against an administrator out of his individual property held to state a cause of action. *Dovey v. Schlater* 735
3. Where judgment is against an administrator in his representative capacity, he may appeal to district court without additional bond. *In re Estate of Dovey* 744

False Pretenses.

1. In a prosecution for false pretenses under sec. 8874, Rev. St. 1913, evidence held insufficient to prove any offense greater than a misdemeanor. *Mason v. State* 221
2. Evidence, in a prosecution for false pretenses, held insufficient to prove either a felony or a misdemeanor. *Mason v. State* 221

Forcible Entry and Detainer.

1. Under sec. 8470, Rev. St. 1913, a complaint in forcible entry and detainer must "particularly describe the premises," in order to confer jurisdiction. *Bishop v. Spaulding* 573
2. Where the description in the complaint in forcible entry and detainer is sufficient to identify the property intended, it is sufficient to confer jurisdiction. *Bishop v. Spaulding* 573
3. Description of the premises in a complaint in forcible entry and detainer held sufficient as against a collateral attack. *Bishop v. Spaulding* 573

Forfeitures. See DEEDS, 3, 4.**Forgery.**

1. Making duplicates of orders for payment of money, imitating makers' signatures, and selling the duplicates for the original orders is a forgery. *Kimmel v. State* 547
2. Authority to make duplicates of orders for the payment of money does not include the right to imitate the signatures of the makers, and then utter the instruments as genuine orders. *Kimmel v. State* 547
3. Evidence of the indorsing and selling of duplicates of orders for their face value, with intent to defraud, will sustain a conviction for forgery. *Kimmel v. State* 547

Forgery—Concluded.

4. An instruction to acquit unless the state established beyond a reasonable doubt that defendant made copies of orders as forged instruments, and not to keep track of his business, *held* not erroneous. *Kimmel v. State* 547

Fraud. See CORPORATIONS, 5, 6. MORTGAGES, 8. RELEASE.

Fraudulent Conveyances. See BANKRUPTCY, 4.

1. The transfer of an entire stock to a creditor in payment of a pre-existing debt, or to a trustee for the benefit of certain creditors, is void, if not made in compliance with the bulk sales law. *Bailen v. Badger Import Co.* 24
2. Where a transfer of personalty from a son to his mother in payment of a past-due indebtedness is attacked by judgment creditors as fraudulent, the burden is on the transferee to show the *bona fides* of the transfer. *Farmers & Merchants Nat. Bank v. Worden* 119
3. Transfer of personalty from son to mother *held* not void as in fraud of creditors. *Farmers & Merchants Nat. Bank v. Worden* 119

Gaming. See PRINCIPAL AND AGENT, 3. SET-OFF.

Guardian and Ward.

An order discharging a guardian and approving a false, final account based on a signed statement procured from the ward by fraud may be vacated on petition for new trial. *In re Hilton* 387

Health. See MUNICIPAL CORPORATIONS, 5-8.

Highways.

Where a county has collected a road tax levied within limits of city, it holds one-half thereof in trust for the city. *City of Falls City v. Richardson County* 663

Husband and Wife. See DIVORCE, 11.

1. A husband living apart from, and paying temporary alimony awarded to, his wife is not liable for necessities furnished her. *Wise Memorial Hospital Ass'n v. Peyton* 48
2. Where husband and wife are permanently separated, and the latter has grounds for divorce, a reasonable agreement in settlement of their property rights and providing for the wife's support will be enforced. *Amspoker v. Amspoker* 122

Husband and Wife—Concluded.

3. Where a wife is compelled by the misconduct of her husband to live apart from him, she is entitled to a decree for separate maintenance. *Pick v. Pick* 433
4. Evidence, in a suit for separate maintenance, held to sustain decree for sum awarded. *Pick v. Pick* 433

Homestead. See DEEDS, 11.

- A 99-year lease purporting to grant a way across a homestead is void unless executed and acknowledged by both husband and wife. *Eng v. Olsen* 183

Infants.

- Service of summons on an infant under 14 by leaving a copy at his usual place of residence is void. *Jordan v. Evans* 666

Injunction. See EXECUTORS AND ADMINISTRATORS, 1, 2. NUISANCE, 2. TAXATION, 1. WATERS, 5.**Insurance.** See COMPROMISE AND SETTLEMENT. JUDGMENT, 5.

1. A provision requiring payment of premiums in advance held waived, where insured was allowed to pay each renewal premium long after it became due. *Owens v. Travelers Ins. Co.* 560
2. The word "dwelling," as used in the policy in suit, held to mean "home or place of habitation." *Hamilton v. North American Accident Ins. Co.* 579
3. A wife, named as beneficiary, who procured a divorce, held to forfeit her right as such beneficiary. *Giffin v. Grand Lodge, A. O. U. W.* 589
4. Under an "average clause" attached to policy covering a lumber yard and contents, buildings and stock within a common inclosure will be regarded as one of the premises named in the average clause, and a yard disconnected therefrom as another. *Mangold v. American Ins. Co.* 656
5. Trustee for minor, designated in policy as beneficiary, is proper party to maintain an action for the unpaid insurance. *Ward v. Bankers Life Co.* 812
6. Sec. 3212, Rev. St. 1913, allowing plaintiff a reasonable sum as an attorney's fee in an action to recover insurance, is applicable to contracts executed before its enactment. *Ward v. Bankers Life Co.* 812

Insurance—Concluded.

7. Where an insurance agent sent an application to a bank to be executed, and it was signed but not returned for more than ten days, and in the meantime the property was destroyed by fire, the delay of the bank is the act of the agent, for which the insurer is responsible, and the question of liability is for the jury. *Wilken v. Capital Fire Ins. Co.* 828

Interest. See COUNTIES AND COUNTY OFFICERS, 1, 2.

Interpleader.

The act of a fraternal society in filing a bill of interpleader to determine conflicting claims to insurance held proper, and not prejudicial to the rights of claimants. *Giffin v. Grand Lodge, A. O. U. W.* 589

Intoxicating Liquors. See STATUTES, 14. VENUE, 1.

1. In estimating damages for loss of support, the jury may consider the situation of deceased, his annual earnings, if any, his habits, health, and reasonable expectancy of life. *Whipple v. Rosenstock* 153
2. A judgment for loss of support cannot be for a greater sum than the value of the means of support. *Whipple v. Rosenstock* 153
3. The death of the husband and father does not cause an action for loss of his support to abate. *Whipple v. Rosenstock* 153
4. In an action for loss of support, it is no defense that defendant had a license. *Whipple v. Rosenstock* 153
5. The bondsmen of liquor dealers who have furnished intoxicating liquors to the husband and father may be joined with the liquor dealers as defendants in an action for loss of support. *Whipple v. Rosenstock* 153
6. A married woman and her minor children, consisting of one family, may sue for loss of support all who have furnished intoxicating liquors to the husband and father, which occasioned or contributed to the damages. *Whipple v. Rosenstock* 153
7. Persons other than a credible, resident freeholder of the county may file a complaint under sec. 3864, Rev. St. 1913. *Nathan v. State* 197
8. An action for loss of support from death of a person resulting from traffic in intoxicating liquors may be maintained by children of deceased. *Phair v. Dumond* 310

Intoxicating Liquors—Continued.

9. Where a wife who supported her minor children died from an assault committed by her husband while drunk, *held*, that a child born after the assault could, after death of mother, recover on liquor dealer's bond for loss of support. *Phair v. Dumond* 310
10. Where whiskey furnished by a saloon-keeper contributed to an intoxication, it was immaterial that the drinker drank other liquor. *Phair v. Dumond* 310
11. Evidence, in an action for death resulting from sale of intoxicating liquors, *held* to sustain verdict for plaintiff. *Moran v. Slattery* 360
12. Instruction as to measure of damages sustained. *Moran v. Slattery* 360
13. An instruction that the liquors furnished decedent need not be the sole, or even the principal, cause of death *held* proper. *Moran v. Slattery* 360
14. A licensed saloon-keeper is liable under sec. 3859, Rev. St. 1913, to one who is injured while intoxicated from drinking liquors furnished by the saloon-keeper. *Forrest v. Koehn*... 441
15. A licensed saloon-keeper *held* liable to the wife and children of the deceased, constituting one family, for all damages to their means of support from sale of liquor to deceased. *Bergmann v. Koehn* 525
16. On a verdict for \$9,000 against a saloon-keeper and his surety, the court may render judgment against the principal for the amount of the verdict, and against the surety for \$5,000, the amount of the bond. *Bergmann v. Koehn* 525
17. Licensed liquor dealers are liable for all proximate consequences of their traffic, and if they have induced drunkenness in a previously sober man who afterwards dies from exposure while intoxicated, even after they have ceased to furnish him liquors, they and their sureties are liable to his widow and children. *Juckett v. Brennaman* 755
18. One selling intoxicating liquor is liable, not only for actual results of sale, but for all damages from disqualification resulting therefrom, without reference to time through which disqualification may continue. *Juckett v. Brennaman* 755
19. A saloon-keeper and sureties on his bond are liable for loss of support sustained by the widow and children of one whose

Intoxicating Liquors—Concluded.

- death was contributed to by the drinking of intoxicating liquors furnished by the saloon-keeper. *Juckett v. Brennaman* 755
20. In action for civil damages, evidence *held* to sustain verdict for plaintiff. *Juckett v. Brennaman* 755
21. Verdict for \$10,000 for loss of support *held* excessive. *Whipple v. Rosenstock* 153

Judgment. See INTOXICATING LIQUORS, 16. MORTGAGES, 2-4.

1. In a suit to enjoin a judgment because of defective service, the petition must allege facts constituting a valid defense to the merits of the original suit. *Alden Mercantile Co. v. Randall* 44
2. A judgment is conclusive of a question raised in a subsequent action, where it appears from the face of the record or is shown by extrinsic evidence that the precise question was raised and determined in the former suit. *Bodie v. Bates*.. 253
3. That a judgment may operate as an estoppel, it must appear, not only that there be a substantial identity of issues, but that the issue as to which the estoppel is pleaded was actually determined in the former action. *Bodie v. Bates* 253
4. Decree in suit to cancel notes *held res judicata* as to the same facts pleaded as a defense to an action on the notes. *Dovey v. Dovey* 627
5. In a suit on a policy against a trustee as beneficiary and the insurer, a judgment for plaintiff *held* void as to trustee, where based on service outside the state, though insurer offered to pay the fund into court. *Ward v. Bankers Life Co.* 812

Jury. See NEW TRIAL, 1.

1. In counties of 30,000 or more inhabitants the regular jury panel must be drawn by lot from the regular jury list, and cannot be filled by the sheriff by calling bystanders. *Haight v. Omaha & C. B. Street R. Co.* 56
2. It will not be presumed, in absence of evidence, that the regular list of jurors was exhausted in the ordinary work of the court. *Haight v. Omaha & C. B. Street R. Co.* 56
3. The regular jury panel cannot be filled pursuant to sec. 8156, Rev. St. 1913, providing for the calling of talesmen. *Haight v. Omaha & C. B. Street R. Co.* 56

Jury—Concluded.

4. Parties to an action are not chargeable with knowledge that the regular jury panel has been exhausted in the trial of a prior case, and then unlawfully filled by calling bystanders. *Haight v. Omaha & C. B. Street R. Co.* 56
5. Where there is no order to call talesmen, and jurors are called in the ordinary manner, counsel in a pending case may presume that the jurors are called from the regular panel. *Haight v. Omaha & C. B. Street R. Co.* 56

Justice of the Peace. See ATTACHMENT, 3.

Landlord and Tenant.

1. Farm lease construed, and held to give landlord an interest in the crop as against the tenant. *Dryden v. Peru Bottom Drainage District* 825
2. The landlord may intervene in an action by the tenant to recover damages to crops, where the lease gives him an interest in the crops. *Dryden v. Peru Bottom Drainage District* 825
3. Evidence, in an action for rent, held not to show termination of lease. *Lenhart v. Wolfson* 482

Libel.

1. A public statement as to qualifications of a candidate for public office is a communication of qualified privilege. *Estelle v. Daily News Publishing Co.* 397
2. A citizen has the right to inform voters of any well-grounded belief as to a candidate's fitness for office. *Estelle v. Daily News Publishing Co.* 397
3. A citizen may in good faith state his belief as to a candidate's fitness for office without becoming liable in damages therefor. *Estelle v. Daily News Publishing Co.* 397
4. One who publishes a statement as to a candidate's qualifications for office is not liable in damages if the statement is true and made for justifiable ends, though it is libelous *per se*. *Estelle v. Daily News Publishing Co.* 397
5. A person is not liable for publishing privileged communications unless there was actual malice. *Estelle v. Daily News Publishing Co.* 397
6. Where published statements are false and libelous *per se*, malice is presumed, and the burden is on defendant to prove that he had evidence justifying him in making them, and

Libel—Concluded.

- in believing them to be true. *Estelle v. Daily News Publishing Co.* 397
7. Where a statement regarding a candidate for public office is libelous *per se* and untrue, the burden is on the party making it to prove that he made it in good faith on evidence sufficient to justify a reasonable man in belief of its truth. *Estelle v. Daily News Publishing Co.* 397
8. An innuendo is to explain and apply the meaning of ambiguous expressions, and, where it gives a meaning that cannot be derived from the language used, it should be stricken on motion. *Estelle v. Daily News Publishing Co.* 397
9. Where a statement published is the statement of an opinion, and an innuendo assumes that it is a statement of fact, instructions which assume that it was a statement of fact are erroneous. *Estelle v. Daily News Publishing Co.* 397

Limitation of Actions. See EMINENT DOMAIN, 2.

A specific money bequest, resting as a lien on realty in the hands of a residuary devisee, is barred after ten years from accrual of right of action thereon. *Overton v. Sack* 64

Mandamus. See CONSTITUTIONAL LAW, 1.

1. The state treasurer may be compelled by mandamus to pay warrants drawn on the fund collected for maintenance of the office of state fire commissioner, without specific legislative appropriation therefor. *State v. Hall* 89
2. Under sec. 6941, Rev. St. 1913, where parents or guardians of 50 children above the fourth grade petition that German be taught, the school board may be compelled by mandamus to comply with such request. *State v. School District* 338
3. Where a county treasurer, on demand for payment of funds into the state treasury at times other than the two dates fixed by sec. 6507, Rev. St. 1913, admits the funds demanded, but refuses to pay over the same, the state treasurer may by mandamus compel performance, notwithstanding secs. 6515, 6516, relative to the duties of the auditor. *State v. Ure* 486
4. Mandamus will lie to compel the state treasurer to obtain and deliver to a county treasurer a receipt countersigned by the auditor for state funds paid by him into the state treasury. *State v. Ure* 486
5. An elector of the county may challenge the constitutionality of a statute which attempts to divide the county into com-

Mandamus—Concluded.

missioner districts and fix the basis of representation in the county board. *State v. Moorhead* 527

Master and Servant. See RAILROADS, 9. RELEASE.

1. Under the workmen's compensation act, after the amount of compensation has been fixed by agreement or by the court, the parties may agree for payment of a lump sum in lieu of periodical payments. *Bailey v. United States Fidelity & Guaranty Co.* 109
2. The employer cannot be compelled to pay, nor the workman or dependent to receive, a lump sum in lieu of periodical payments. *Bailey v. United States Fidelity & Guaranty Co.*.... 109
3. Where the employer and a dependent have agreed for payment of a lump sum, such agreement, if reasonable, will bind an insurance company which has assumed a risk under sec. 3683, Rev. St. 1913. *Bailey v. United States Fidelity & Guaranty Co.* 109
4. Commutation of payments to a lump sum under the workmen's compensation act is allowable only when it clearly appears that the condition of the beneficiaries warrants such departure. *Bailey v. United States Fidelity & Guaranty Co.* 109
5. Sec. 3683, Rev. St. 1913, held not to require that six months must elapse before an agreement for a lump sum payment to residents may be made, or that consent of the district court be procured to such an agreement. *Bailey v. United States Fidelity & Guaranty Co.* 109
6. A lump sum settlement made under the workmen's compensation act by taking the present value of the periodical payments computed at 5 per cent. simple interest held not erroneous. *Bailey v. United States Fidelity & Guaranty Co.* 109
7. Liability under the employers' liability act does not arise unless the accident happened in the course of employment, and arose out of the employment. *Pierce v. Boyer-Van Kuran Lumber & Coal Co.* 321
8. An accident resulting from a risk reasonably incident to the employment should be considered as arising out of the employment. *Pierce v. Boyer-Van Kuran Lumber & Coal Co.* .. 321
9. The master is not liable under the employers' liability act for an injury to a fellow workman. *Pierce v. Boyer-Van Kuran Lumber & Coal Co.* 321

Master and Servant—Continued.

10. The right to commute compensation to one or more lump sum payments depends on agreement of the parties, except that their right to so agree in specified cases depends on consent of the district court. *Pierce v. Boyer-Van Kuran Lumber & Coal Co.* 321
11. Where the district court finds on investigation that special circumstances exist making it necessary to commute compensation to a lump sum, the court may consent to an agreement therefor by the parties. *Pierce v. Boyer-Van Kuran Lumber & Coal Co.* 321
12. Where an accident to an eye, which appeared not serious, resulted shortly after in a diseased condition which destroyed the sight, the "injury occurred," within the employers' liability act, when the diseased condition culminated. *Johansen v. Union Stock Yards Co.* 328
13. The district court cannot enter judgment for a lump sum under the employers' liability act without agreement of the parties. *Johansen v. Union Stock Yards Co.* 328
14. Under the federal employers' liability act, contributory negligence is not a complete defense. *Huxoll v. Union P. R. Co.* 170
15. Under the federal employers' liability act, assumption of risk is only eliminated as a defense where the carrier's violation of a statute enacted for the safety of employees contributed to the injury or death of the employee. *Huxoll v. Union P. R. Co.* 170
16. An employee assumes the ordinary risks of his employment, but not extraordinary risks caused by negligence of the employer. *Huxoll v. Union P. R. Co.* 170
17. A locomotive engineer, in walking to his engine in switching yards through smoke and steam, does not assume the risk that his employer will propel an engine backwards through the yards without warning or lookout. *Huxoll v. Union P. R. Co.* 170
18. The running of a high-tank road engine backwards in switching yards without a lookout held negligence. *Huxoll v. Union P. R. Co.* 170
19. Where the petition sets up facts from which the conclusion follows that plaintiff and defendant's servants charged with the negligence alleged were not fellow servants, such fact need not be specifically alleged. *Irwin v. Gould & Sons* 283

Master and Servant—Concluded.

20. Employment in the service of a common master will not alone constitute two men fellow servants within the rule exempting the master from liability resulting from negligence of a fellow servant. *Irwin v. Gould & Sons* 283
21. In an action for personal injuries, employee held to have assumed the risk. *Moriarty v. Miller* 614
22. The violation of sec. 3597, Rev. St. 1913, requiring employer to guard shafting, is gross negligence. *McCarthy v. Village of Ravenna* 674
23. A palpable violation of ch. 65, Laws 1911, by the employer is gross negligence. *Butera v. Mardis Co.* 815
24. Contributory negligence is a defense in actions for damages for violation of ch. 65, Laws 1911, requiring protection in construction work. *Butera v. Mardis Co.* 815
25. Employees need not anticipate that their employers will fail to comply with ch. 65, Laws 1911. *Butera v. Mardis Co.* ... 815
26. Evidence held to sustain finding that defendant violated ch. 65, Laws 1911. *Butera v. Mardis Co.* 815
27. Evidence held to sustain finding that deceased was not guilty of contributory negligence. *Butera v. Mardis Co.* 815
28. The owner of realty who authorized the improvement held liable for damages from violation of ch. 65, Laws 1911, relating to protection of persons in construction work. *Butera v. Mardis Co.* 815
29. Ch. 65, Laws 1911, relating to protection of persons in the construction of buildings, held constitutional. *Butera v. Mardis Co.* 815

Mortgages. See DEEDS, 13. TAXATION, 9-14.

1. An order of sale, sale and confirmation, made after death of a party to a foreclosure suit subsequent to the decree, cannot be attacked collaterally. *Omaha Nat. Bank v. Ferguson.* 131
2. A decree of foreclosure of a mortgage is not a judgment within sec. 8056, Rev. St. 1913, relating to dormant judgments. *Jenkins Land & Live Stock Co. v. Kimsey* 308
3. A decree of foreclosure may be enforced without an order of sale. *Jenkins Land & Live Stock Co. v. Kimsey* 308
4. The lien of a foreclosure decree is not lost by failure to procure issuance of order of sale within five years from date of decree. *Jenkins Land & Live Stock Co. v. Kimsey* 308

Mortgages—Concluded.

5. In a suit to foreclose an unrecorded mortgage, a cross-petitioner seeking to foreclose a subsequent mortgage as a first lien must allege the actual consideration and payment thereof, and facts showing that he took his mortgage without notice of plaintiff's interests. *Southwick v. Reynolds* .. 393
6. In a suit to foreclose an unrecorded mortgage, where a cross-petitioner seeks to foreclose a subsequent mortgage as a first lien, the presumption that the secured note was issued for a valuable consideration is insufficient to show the actual consideration paid. *Southwick v. Reynolds* 393
7. Where allegations of petition to foreclose a mortgage are denied, the burden is on plaintiff to make *prima facie* proof that no action at law has been instituted to recover the debt. *Great Western Commission Co. v. Schmeeckle* 672
8. In a suit to foreclose mortgages, evidence *held* to sustain finding of fraud, and that defendants were damaged in excess of amount of mortgages. *Powell v. Mayhew* 708

Municipal Corporations.

1. It is actionable negligence to deposit sand and stone on a paved street and allow it to remain over night without a danger signal. *Britt v. Omaha Concrete Stone Co.* 300
2. A published notice of a petition for street paving directed to owners of lots within an improvement district and to owners of lots abutting on or adjacent to a designated street *held* binding on the owner of a lot 49 feet from the street, but connected therewith by another street and an alley. *Hoopes v. City of Omaha* 460
3. The Omaha city charter making the finding of the city council that a petition for the creation of an improvement district is regular, legal and sufficient conclusive except on appeal, *held* valid. *Hoopes v. City of Omaha* 460
4. A municipal corporation possesses only such powers as are expressly conferred by statute, or are necessary to carry into effect enumerated powers. *State v. Temple* 505
5. A city board of health *held* to have no jurisdiction to make the maintenance of a slaughterhouse outside the city a crime. *State v. Temple* 505
6. Secs. 5015, 5017, Rev. St. 1913, *held* not to authorize a city board of health to adopt and enforce a "regulation" making it criminal to maintain a slaughterhouse outside the city. *State v. Temple* 505

Municipal Corporations—Concluded.

7. Sec. 5106, Rev. St. 1913, which confers certain powers on villages and cities of the second class, does not confer those powers on the city board of health. *State v. Temple* 505
 8. A city ordinance *held* not to give validity to a "regulation" of the board of health which attempted to make the maintenance of a slaughterhouse outside the city a crime. *State v. Temple* 505
 - 9 A city can tax only such property as is within the city. *State v. Nickerson* 517
 10. Taxes cannot be levied on property for city purposes after it has been detached from the city by the judgment of a court. *State v. Nickerson* 517
 11. City *held* not liable for damages resulting to property owner from erroneous information given by the city engineer as to technical language and records pertaining to street grades. *Reese v. City of Lincoln* 594
 12. Local corporations created by request or consent of residents and principally for their benefit, though clothed with powers of a public nature, are liable for damages caused by negligence. *Bunting v. Oak Creek Drainage District* 843
- Negligence.** See APPEAL AND ERROR, 23. CARRIERS. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 1. RAILROADS. STREET RAILWAYS.
1. Where the evidence shows both negligence and contributory negligence, the duty to make the comparison required by sec. 7892, Rev. St. 1913, rests with the jury, unless the evidence as to negligence is legally insufficient, or contributory negligence is clearly shown. *McCarthy v. Village of Ravenna* 674
 2. Violation of a statute for protection of persons and property constitutes negligence *per se*, rendering violator liable in damages, though the statute be penal in nature and silent as to liability for damages. *Walker v. Klopp* 794
 3. Under sec. 3048, Rev. St. 1913, an owner of an automobile who permits a minor child under 16 years to operate it is guilty of negligence, and is liable therefor when other elements of actionable negligence are present. *Walker v. Klopp* 794
 4. Evidence *held* competent as proof that at time of accident defendant's minor son was operating defendant's automobile by his permission. *Walker v. Klopp* 794

New Trial. See CRIMINAL LAW, 4.

1. Where the regular panel has been filled from bystanders and a jury called therefrom, without knowledge of the parties until after trial, objection then made in a motion for new trial should be sustained and a new trial granted. *Haight v. Omaha & C. B. Street R. Co.* 56
2. A new trial will be granted for newly discovered evidence, on a showing that evidence given by the prevailing party was untrue, that its falsity could not have been anticipated, and that the verdict on another trial will probably be different. *Coon v. Drainage District* 138

Novation.

1. There can be no novation of a debt in absence of an unqualified discharge of the original debtor by the creditor. *Indiana Bridge Co. v. Hollenbeck* 115
2. An accepted order assigning to a creditor money to become due from the state to a public building contractor held not a bar to an action against the contractor for a balance due on the order; where it was not agreed that the assignment should discharge the debtor's obligation. *Indiana Bridge Co. v. Hollenbeck* 115
3. An agreement between two parties that one shall pay a third person a sum for which they were separately liable in equal parts does not create a novation without the sanction of the third party. *Nelson v. Nelson* 456

Nuisance.

1. Sec. 8845, Rev. St. 1913, which makes the maintenance of a nuisance a crime applies to all common-law nuisances. *State v. Temple* 505
2. A suit to enjoin a nuisance may be maintained by a city of the second class or a village. *State v. Temple* 505

Parent and Child. See NEGLIGENCE, 3, 4.**Parties.** See CONSTITUTIONAL LAW, 2, 3. INSURANCE, 5. INTOXICATING LIQUORS, 5-9.

1. One who purchases choses in action during pendency of suit thereon may sue in the name of the original plaintiff and obligee, on a bond for redelivery of property attached in the suit. *Commercial Nat. Bank v. Faser* 105
2. The defense that an executrix cannot maintain a suit to enforce a resulting trust against a person to whom legal title had been conveyed is waived unless interposed by demurrer or answer. *Kuncl v. Kuncl* 390

Parties—Concluded.

3. Indispensable parties are those whose interest is such that final decree cannot be made without affecting their interests, or leaving the controversy in such condition that its final determination may be wholly inconsistent with equity and good conscience. *Jordan v. Evans*. 666

Paupers.

- County *held* not liable to a township for care of an indigent man who had a son able to care for him living in the county. *Newark Township v. Kearney County* 142

Physicians and Surgeons.

1. A physician or surgeon must exercise the care and skill usually exercised by physicians or surgeons in good standing, of the same school in the vicinity, having regard for the advanced state of science. *Van Boskirk v. Pinto* 164
2. A surgeon is not liable for a mistake in judgment made in diagnosing a physical injury, where he has used requisite care and skill. *Van Boskirk v. Pinto* 164
3. Evidence *held* not to show that defendant's failure to procure a Roentgen picture of plaintiff's foot and ankle constituted lack of reasonable care and skill. *Van Boskirk v. Pinto*. 164
4. Whether a physician and surgeon exercised reasonable care and skill *held* a question for the jury under the evidence. *Van Boskirk v. Pinto* 164

Pleading. See CORPORATIONS, 2. JUDGMENT, 1. LIBEL, 8, 9. MASTER AND SERVANT, 19. MORTGAGES, 5.

1. Where a party answers over after an adverse ruling on a demurrer and goes to trial on the merits, he waives the error, if any, in such ruling. *Genho v. Jackson* 1
2. A petition purporting to set out several causes of action is good as against a general demurrer, if one cause is well pleaded. *Genho v. Jackson* 1

Principal and Agent. See INSURANCE, 7. SET-OFF.

1. Where a principal accepts the benefits of a contract made for him by his agent, he is chargeable with the instrumentalities used by the agent in procuring it. *Nye-Schneider-Fowler Grain Co. v. Hopkins* 244
2. A principal cannot adopt the beneficial part of an unauthorized contract and reject the remainder. *Nye-Schneider*

Principal and Agent—Concluded.

- Fowler Grain Co. v. Hopkins* 244
3. Brokers *held* liable to the principal for money taken from the agent and used in gambling speculation. *Hinds & Lint Grain Co. v. Farmers Elevator Co.* 502
4. Though an agent cannot appoint subagents to transact business of his principal, he may delegate execution of ministerial acts. *Wilken v. Capital Fire Ins. Co.* 828

Principal and Surety. See CONTRACTS, 6.

Process. See INFANTS.

In an action against an incorporated insurance company in a county where there is an agency, service may be upon the chief officer of such agency. *Juckett v. Brennaman*..... 755

Quo Warranto. See COUNTIES AND COUNTY OFFICERS, 6.

Railroads. See ADVERSE POSSESSION. CARRIERS. TAXATION, 2-5.

1. A person walking on a railroad track, where there is no public crossing, is a trespasser. *Hooker v. Wabash R. Co.* .. 13
2. A deaf trespasser on a railroad track must use extraordinary care and exercise his sense of sight to learn of the approach of trains. *Hooker v. Wabash R. Co.* 13
3. Where a deaf trespasser walking on a railroad track fails to use his sense of sight and is struck by a train, the company is not liable unless the engineer carelessly ran him down. *Hooker v. Wabash R. Co.* 13
4. Evidence *held* not to show that the engineer carelessly ran into a trespasser on the track. *Hooker v. Wabash R. Co.* .. 13
5. Evidence *held* not to show that a railroad company was liable for death of a trespasser under the doctrine of the last clear chance. *Hooker v. Wabash R. Co.* 13
6. Where a pedestrian was struck by a train approaching him from the rear, *held* that it was the duty of those in charge of the train, not only to ring the bell, but to sound the whistle. *Malke v. Chicago, R. I. & P. R. Co.* 158
7. An adult person who attempted to pass over the coupling between two cars standing on a street crossing *held* guilty of contributory negligence. *Pansk v. Missouri P. R. Co.* 234
8. Where a traveler goes on a railroad crossing without looking and listening or having a reasonable excuse for not doing so, he cannot recover for resulting injury. *Smith v. Chicago, M. & St. P. R. Co.* 378

Railroads—Concluded.

9. Where a railroad company's rules required section-foremen on approaching a curve through a cut on a handcar to send a man ahead, failure of trainmen to give warning of approach of train before presence of section-men is discoverable is not negligence, in absence of a statute or rule requiring them to do so. *McCracken v. Delano* 778
10. Failure of a train crew to blow whistle on approaching a railroad bridge over a roadway is not negligence, as a matter of law, in absence of a statute or rule imposing such a duty. *McCracken v. Delano* 778

Rape.

1. Evidence of opportunity and inclination held to sufficiently corroborate prosecutrix' direct and positive evidence that accused ravished her. *Whetstone v. State* 469
2. Evidence held to sustain conviction. *Parmalee v. State*.... 598

Release.

1. Plaintiff, in action for personal injuries, has burden of proving that a release was procured by fraud, or that at time release was executed he was incapable of understanding the nature and quality of the act. *Perry v. Omaha Electric Light & Power Co.* 730
2. When the amount received in settlement is grossly inadequate to compensate for injuries, that fact may be considered as tending to show unfair practice in procuring a release. *Perry v. Omaha Electric Light & Power Co.* .. 730

Replevin.

1. In replevin, where the jury has fixed an excessive value to the property, which excess the defendant offers to remit, it is ordinarily the duty of the court to order a remittitur and render judgment on the verdict. *McAvoy v. Osborn* 608
2. In replevin, where the court, after setting aside a verdict for defendant, finds fraud in the bill of sale under which plaintiff claims title, and that neither party is entitled to relief, it is error to dismiss the case, leaving plaintiff in possession which he obtained by the writ. *McAvoy v. Osborn* 608

Sales. See FRAUDULENT CONVEYANCES, 1.

1. Where a manufacturer or dealer contracts to supply an article, there is an implied warranty that the article will be reasonably fit for the purpose to which it is to be applied. *Oxygenator Co. v. Johnson* 641

Sales—Concluded.

2. In action for damages for breach of warranty of personalty, where there is no rescission of contract, the measure of damages is the difference between value of property as it is and what it would have been worth if as represented. *Oxygenator Co. v. Johnson* 641
3. In an action for price of goods, evidence held to sustain verdict for defendant. *Oxygenator Co. v. Johnson* 641
4. In an action on a note given for a hay baler, defense of breach of warranty held not proved. *First Nat. Bank v. Schiermeyer* 704
5. The bulk sales law held constitutional. *Niklaus v. Lesenhop* 803

Schools and School Districts. See MANDAMUS, 2.

1. A school levy should be made for no more than the difference between the amount on hand and the amount required for the ensuing school year. *Union P. R. Co. v. Troupe* 73
2. Where a school district votes a tax to create a building fund without complying with sec. 6743, Rev. St. 1913, any assessment or levy made thereunder is void. *Union P. R. Co. v. Troupe* 73
3. What shall be done in the common schools in an educational way is to be determined at school meetings held in each school district, and by school officers. *State v. School District* 338

Set-off.

- A claim for money paid to plaintiff by defendant's agent for gambling speculation is in the nature of a claim for money had and received, and is a proper subject of set-off in an action on contract. *Hinds & Lant Grain Co. v. Farmers Elevator Co.* 502

States. See MANDAMUS, 3, 4. STATUTES, 1, 2.

- The times when county treasurers are required by sec. 6507, Rev. St. 1913, to pay over state funds are the two dates therein fixed and such other reasonable dates as the state treasurer shall fix. *State v. Ure* 486

Statutes. See CONSTITUTIONAL LAW. INSURANCE, 6.

- 1 The fund created by ch. 23, Rev. St. 1913, and set apart by sec. 2511 for maintenance of the office of state fire commissioner may be paid out by the state treasurer on auditor's warrants without a specific appropriation. *State v. Hall* 89

Statutes—Continued.

2. Sec. 19, art. III, Const., relating to legislative appropriations, held not to apply to funds created for maintenance of the office of state fire commissioner. *State v. Hall* 89
3. The fundamental principle in statutory construction is ascertainment of the legislative intent. *State v. School District* 338
4. In construing a statute words should be given their usual meaning. *State v. School District* 338
5. Where a statute is unambiguous, courts will give the language used its plain and ordinary meaning. *State v. School District*. 338
6. Courts will not inquire into the motives for the enactment of laws, nor determine their wisdom. *State v. School District* 338
7. The policy of any enactment is for the legislature, and not for the courts. *State v. School District* 338
8. An act complete in itself is not violative of sec. 11, art III. of the Constitution. *State v. School District* 338
9. Where an act complete in itself is repugnant to a prior act to which it does not refer, the prior act is repealed by implication. *State v. School District* 338
10. Courts will not read into a statute exceptions not made by the legislature. *State v. School District* 338
11. In construing a federal statute, a state court will follow the construction placed upon it by the federal courts. *Hadley v. Union P. R. Co.* 349
12. In construing a statute, reasonable doubts must be resolved in favor of its constitutionality. *Smith v. Chicago, St. P., M. & O. R. Co.* 719
13. The presumption that an exception to general provisions of an act is justified by facts within the knowledge of the lawmakers can only be overthrown by pleading and proof, unless an unreasonable classification appears on the face of the act, by facts of which the court takes judicial notice. *Rushart v. Crippen* 682
14. Ch. 81, Laws 1907, amending sec. 25, ch. 50, Laws 1905, by prohibiting license to sell liquor near military post, though incidentally modifying other statutes, does not violate sec. 11, art. III, Const., relating to amendments. *Rushart v. Crippen* 682

Statutes—Concluded.

15. Simultaneous repeal and re-enactment of a statute in terms or in substance is mere affirmance of original act, and not a repeal thereof. *Bauer v. State* 747

Street Railways.

1. Where a person walked back of the street car from which he had alighted and started to cross a parallel track without looking or listening for an approaching car, *held*, that he was guilty of contributory negligence. *Critchfield v. Omaha & C. B. Street R. Co.* 240
2. In an action for death, instruction *held* not objectionable as authorizing jury to find defendant guilty of negligence wholly unsupported by the evidence. *Owens v. Omaha & C. B. Street R. Co.* 364

Taxation. See HIGHWAYS. MUNICIPAL CORPORATIONS, 9, 10. SCHOOLS AND SCHOOL DISTRICTS, 1, 2.

1. Injunction will lie to restrain collection of a tax levied or assessed for an unauthorized or illegal purpose. *Union P. R. Co. v. Troupe* 73
2. For taxation purposes a railroad is an entity, including property held and used principally in operating the road. *Chicago, B. & Q. R. Co. v. Box Butte County* 208
3. In doubtful cases the determination of the state board of equalization as to whether particular property is part of a railroad should be considered by local assessors. *Chicago, B. & Q. R. Co. v. Box Butte County* 208
4. Steel rails not to be used within the state and fencing on leased land, not assessed by the state board, *held* assessable locally. *Chicago, B. & Q. R. Co. v. Box Butte County* 208
5. The words "right of way and depot grounds" in sec. 6375, Rev. St. 1913, *held* not to exclude from the jurisdiction of the state board in assessing railroads all property situated more than 100 feet from the center of the main track. *Chicago, B. & Q. R. Co. v. Box Butte County* 208
6. Under sec. 6314, Rev. St. 1913, personal property must ordinarily be listed where the owner resides, but property having local situs must be listed at the place of such situs. *Nye-Schneider-Fowler Co. v. Boone County* 383
7. Under sec. 6314, 6329, Rev. St. 1913, where a corporation operates stations for selling lumber in several counties, each station should be assessed separately, and net credits ascer-

Taxation—Concluded.

- tained by deducting the indebtedness thereat from the gross credits. *Nye-Schneider-Fowler Co. v. Boone County* 383
8. Property is taxed when the tax is levied, and not when it is valued by the assessor. *State v. Nickerson* 517
 9. The mortgage tax law having made recorded mortgages an interest in real estate to be separately assessed and taxed, it is immaterial whether money secured is from the mortuary fund or general fund of a beneficial association. *Grand Lodge v. Sarpy County* 647
 10. Where a beneficial association records a real estate mortgage, it ceases to be personalty, and is taxable in county where land is situated. *Grand Lodge v. Sarpy County* 647
 11. The owner of realty cannot complain of taxation of mortgage thereon so long as no greater burden is laid upon him than tax on excess of value above mortgage. *Grand Lodge v. Sarpy County* 647
 12. Under mortgage tax law (Rev. St. 1913, secs. 6349-6353) real estate mortgages are taxable only in county where land is situated. *Grand Lodge v. Sarpy County* 647
 13. Under mortgage tax law, mortgage on realty, when recorded, becomes an interest in real estate for purposes of assessment and taxation. *Grand Lodge v. Sarpy County* 647
 14. Mortgage tax law permits separate taxation of mortgage interest apart from the equity of redemption. *Grand Lodge v. Sarpy County* 647
 15. A fraternal beneficial association is not such a charitable association that its funds are exempt from taxation. *Grand Lodge v. Sarpy County* 647
 16. Property of domestic mutual benefit associations is taxable as property of individuals, corporations, and other domestic associations. *Grand Lodge v. Sarpy County* 647

Towns.

The board of supervisors in a county under township organization may create new towns. *State v. Town of Golden* 782

Trade-Marks and Trade-Names.

1. It is an infringement of a trade-name to use, in the same locality and in the same line of business, a name of similar import. *Basket Stores v. Allen* 217

Trade-Marks and Trade-Names—Concluded.

2. To entitle the owner of a trade-mark to enjoin a competitor from injuring his property by false representations, both must be engaged in the sale of the same kind of goods.
Basket Stores v. Allen 217

Trespass. See VENUE, 3.

1. One in possession of realty may maintain an action for trespass thereon. *Dryden v. Peru Bottom Drainage District* 837
2. Casting water on lands of another is trespass. *Dryden v. Peru Bottom Drainage District*. 837

Trial. See APPEAL AND ERROR. CRIMINAL LAW. DAMAGES, 2, 3. LANDLORD AND TENANT, 2. NEGLIGENCE, 1. REPLEVIN. STREET RAILWAYS, 2.

1. Where the court had properly instructed on contributory negligence, *held* that it was not error to refuse to give more specific instructions thereon. *Malko v. Chicago, R. I. & P. R. Co.* .. 158
2. A requested instruction was properly refused where the narration of facts therein did not correspond with the testimony of defendant's witnesses. *Owens v. Omaha & C. B. Street R. Co.* 364
3. Where the instructions considered together properly state the law, they are sufficient. *Forrest v. Koehn* 441
4. The practice of copying pleadings in stating the issues criticised, but *held* not to require a reversal. *Forrest v. Koehn*.. 441
5. In stating the issues in an action for injuries, where the evidence sustains only one act of negligence, recital of others is without prejudice, where such recital is followed by an instruction clearly eliminating everything but the act proved. *Wilson v. Omaha & C. B. Street R. Co.* 693
6. In an action at law, the trial court is not required to make special findings when directing verdict. *First Nat. Bank v. Schtermeyer* 704
7. If a petition states one cause of action and contains allegations as to another which are insufficient, overruling a motion to require plaintiff to separately state and number will not require reversal, in absence of motion to strike. *Bunting v. Oak Creek Drainage District* 843

Trover. See CONVERSION.

Trusts. See PARTIES, 2.

1. Where one buys realty and takes the title in the name of another, the grantee holds the property in trust for the purchaser. *Doll v. Doll* 82
2. Where one buys realty in the name of another, the trust created is a resulting trust, not affected by the statute of frauds. *Doll v. Doll* 82
3. The same presumptions and rules as to resulting trusts apply to transactions between uncle and nephew as between strangers. *Doll v. Doll* 82
4. Evidence held to require a finding that the title to the realty in controversy was held in trust. *Doll v. Doll* 82
5. Where the purchaser of realty takes the legal title in his brother's name to give him credit, equity may decree a resulting trust. *Kuncl v. Kuncl* 390

Vendor and Purchaser.

Evidence, in a suit to set aside deeds for fraud, held to show that the defendant holders of the legal title were not bona fide purchasers for value. *Miller v. Wentz Co.* 286

Venue.

1. An action for civil damages against a saloon-keeper and his surety may be brought in any county where the surety may be found. *Juckett v. Brennaman* 755
2. A foreign corporation is "found," within sec. 7619, Rev. St. 1913, authorizing service where defendant may be found, in any county in which service can be had upon its agent. *Juckett v. Brennaman* 755
3. Actions for trespass on realty must be brought in the county where the realty or part thereof is situated. *Dryden v. Peru Bottom Drainage District* 837

Waters.

1. Evidence, in a suit to enjoin an irrigation company from charging a discriminatory rate, held not to show a discrimination. *Burtless v. McCook Irrigation & Water Power Co.* ... 250
2. In an action for damages to crops from flooding caused by alleged negligent construction of railroad grades, a verdict for defendant will not be set aside if sustained by competent evidence. *Sawyer v. Chicago, B. & Q. R. Co.* 294
3. Where, in an action for damages due to construction of railroad grades, it was not alleged that the construction was not

Waters—Concluded.

- necessary, failure of an instruction to contain the word "necessary" found in sec. 5944, Rev. St. 1913, *held* not error. *Sawyer v. Chicago, B. & Q. R. Co.* 294
- 4 A landowner may not rightfully divert waters of a watercourse or surface waters onto land of his neighbor to his damage. *Keifer v. Shambaugh* 709
5. Injunction will lie to protect a landowner from overflow of surface water or water in a watercourse accumulated and discharged in a body on his land. *Keifer v. Shambaugh* 709
6. A riparian owner may restore to its former channel a stream which erosion has caused to flow in a new channel, within a reasonable time and before interests of lower proprietors will be injuriously affected by such restoration. *Johnk v. Union P. R. Co.* 763

Wills. See LIMITATION OF ACTIONS.

1. Testator's intention, as ascertained from a comprehensive view of the whole will, must govern. *Worley v. Wimberly* .. 20
2. A will *held* to convey to testator's widow only a life estate. *Worley v. Wimberly* 20
3. Where counsel were employed by decedent's husband, who was not a legatee, and the will was successfully contested, *held*, that compensation for such services, costs and necessary expenses were proper charges against the estate. *In re Estate of Merica* 229
4. The amount of attorney fees for successfully contesting a will depends on the necessity of the employment, the services rendered, the size of the estate, and the benefits. *In re Estate of Merica* 229
5. Ch. 222, Laws, 1915, defining the word "week," *held* not to change the construction of sec. 1303, Rev. St. 1913, providing for publication of notices in weekly papers of times and places appointed for proving wills. *In re Estate of Johnson* 275
6. The burden is on contestants to establish undue influence, and it is not enough to show that circumstances are consistent with hypothesis of undue influence, but they must be inconsistent with a contrary hypothesis. *Spier v. Spier* 853
7. Will *held* not improperly executed because one witness was under 14 years of age. *Spier v. Spier* 853
8. Where testatrix, though aged, knows the amount and character of her property, natural objects of her bounty, and per-

Wills—Concluded.

sons and purposes to whom she makes devises and bequests, she is competent to make a will. *Spier v. Spier* 853

Witnesses.

1. Threatening letters from a husband to his wife while they are living apart in contemplation of a suit for divorce are not confidential communications. *McNamara v. McNamara*. 9
2. Statements by one contemplating marriage to his intended wife relative to his property held admissible in a proceeding to subject his property to payment of a decree for alimony. *McNamara v. McNamara* 9
3. A witness cannot be cross-examined as to collateral matters for the purpose of subsequently impeaching him. *Owens v. Omaha & C. B. Street R. Co.* 364
4. A party should not be permitted to cross-examine a witness as to matters outside the scope of his direct examination. *Owens v. Omaha & C. B. Street R. Co.* 364
5. A witness who has direct legal interest in the result of litigation not adverse to representative of deceased is not incompetent. *Anderson v. Akins* 630
6. One jointly interested with plaintiff in a claim against the estate of decedent is disqualified as witness for claimant, but the fact that two claims are for services to decedent will not disqualify claimants as witnesses for each other where the claims are on separate transactions. *Anderson v. Akins* 630

Work and Labor.

Where there is no express contract as to the value of services, the measure of recovery is their actual value. *Anderson v. Akins* 630

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